Supreme Court, U.S.
FILED
NOV 26 1980
MICHAEL RODAK, JR., CLERK

80-853

No. ....
IN THE

Supreme Court of the United States

October Term, 1980

PENTHOUSE INTERNATIONAL, LTD., *et al.*,

Appellants,

vs.

RANCHO LA COSTA, INC., *et al.*,

Appellees.

On Appeal from the
Court of Appeal of the State of California.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

Questions Presented.

1. Did the California Court of Appeal err in holding that the right of privacy guaranteed by the California Constitution is "paramount to the right of free speech" guaranteed by the United States Constitution in the context of a *defamation* action against media defendants, and that "the right of free speech guaranteed by the . . . federal Constitution does not permit violation of the right of privacy"?

2. Did the California Court of Appeal err in holding that media defendants in a libel action brought by reputed organized crime figures, must prove the *truth* of the alleged libel — *i.e.*, that the plaintiffs are in fact "mobsters" — before obtaining the benefit of the public figure privilege?

3. Did the California Court of Appeal err in holding that the determination of public figure status is a question

of "fact" which must be resolved by the *jury* rather than a question of law to be decided by the court?

4. Is a corporation a public figure under the First Amendment when that corporation operates a nationally-promoted and publicized resort which has become the focus of a public controversy concerning the alleged ties of the resort to organized crime?

5. Does Section 47(3) of the California Civil Code, when construed to provide a qualified privilege only to "local" media publications and to be "inapplicable to a defamatory article . . . in a national magazine," unconstitutionally discriminate against national publications in violation of the Equal Protection Clause of the Fourteenth Amendment?

Parties to the Proceedings Below.

Appellants Penthouse International, Ltd., Robert Guccione, Lowell Bergman and Jeff Gerth appeal from the judgment of the Court of Appeal of the State of California, Second Appellate District, entered on June 6, 1980. Rehearing was denied by the Court of Appeal on June 26, 1980, and on August 28, 1980, the California Supreme Court denied a timely-filed petition for hearing.

Appellants were Real Parties in Interest before the Court of Appeal below. Appellees were the Petitioners before the Court of Appeal: Rancho La Costa, Inc., La Costa Land Company, La Costa Management Company, La Costa Community Antenna System, Inc., Paradise Homes, Inc., Merv Adelson and Irwin Molasky. Respondent below was the Superior Court of the State of California, County of Los Angeles.

Appellants submit this Jurisdictional Statement to show that this Court has jurisdiction of this appeal and that substantial questions are presented.

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Opinions Below.

The opinion of the Court of Appeal is reported at 106 Cal. App. 3d 646, 165 Cal. Rptr. 347, 6 Med. L. Rptr. 1351 (1980) and is set forth in the Appendix hereto at pages B-1 through B-28. The unreported order of the Court of Appeal denying rehearing is set forth at page C-1 of the Appendix, and the unreported order of the California Supreme Court denying appellants' petition for hearing is set forth at page D-1 of the Appendix. In addition, the unreported order of the Superior Court of the State of California, which order was reviewed by the Court of Appeal, is set forth at pages A-1 through A-2 of the Appendix.

Jurisdiction.

The judgment of the California Court of Appeal conclusively determined an original proceeding for a peremptory writ commenced by appellees in that court. Such a writ proceeding is a distinct suit, and the judgment finally disposing of that proceeding is a "final judgment" within the meaning of 28 U.S.C. § 1257(2). *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 14 (1931). See also, *Madruga v. Superior Court*, 346 U.S. 556, 557 (1954).

The subject writ proceeding disposed of a limited number of issues raised in the context of a civil action for libel brought by appellees against appellants.[1] Compare, *Costarelli v. Massachusetts*, 421 U.S. 193, 199 (1975). Even though the effect of the Court of Appeal's judgment is to permit further proceedings in that libel action, the judgment is nonetheless final for purposes of review by this Court. *Rescue Army v. Municipal Court*, 331 U.S. 549, 565 (1947).

Moreover, under California law the judgment of the Court of Appeal is *res judicata* of the issues decided therein. *Overstreet v. County of Butte*, 57 Cal. 2d 504, 506 (1962).

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[1]That libel action is presently pending in Los Angeles Superior Court, case number C 124 901.

The judgment of the Court of Appeal is therefore "final" in all respects. *Cf.*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975).

In its decision, the California Court of Appeal concluded *inter alia* that the "privacy" clause in the Constitution of the State of California creates a constitutional right to seek redress for *defamation* and that such right is "paramount" to appellants' First Amendment rights under the United States Constitution. In view of the explicit conclusion of the Court of Appeal that appellants' First Amendment rights must yield to appellees' rights under the California Constitution, this appeal is taken pursuant to 28 U.S.C. § 1257(2). See *PruneYard Shopping Center v. Robins*, ... U.S. ...., 64 L. Ed. 2d 741, 751 (1980); *cf.*, *Garrison v. Louisiana*, 379 U.S. 64 (1964).

In addition, the Court of Appeal sustained the validity of a California statutory privilege against the claim that the statute, as construed by the Court of Appeal, is repugnant to the Equal Protection Clause of the Fourteenth Amendment. Specifically, the Court of Appeal construed the statute as protecting only "local" media publications, not "national" publications, thereby denying appellants equal protection of the laws of California. Appellate review is sought of this holding also pursuant to 28 U.S.C. § 1257(2).

The judgment of the Court of Appeal was filed on June 6, 1980. A petition for rehearing before that Court was timely filed on June 23, 1980 and was denied on June 26, 1980 (C-1). A petition for hearing was timely filed in the California Supreme Court on July 16, 1980, and was denied on August 28, 1980 (D-1). This Jurisdictional Statement is filed within ninety days of the latter denial. Notice of Appeal (E-1) was filed in the Court of Appeal on October 1, 1980.

Statutes Involved.

Article 6, clause 2, United States Constitution:

> "This Constitution . . . shall be the supreme law of the Land; and the Judges in every State shall be bound

thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.''

First Amendment, United States Constitution:

''Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .''

Fourteenth Amendment, United States Constitution:

''No state shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.''

Article I, Section 1, California Constitution:

''All people . . . have inalienable rights. Among these are . . . pursuing and obtaining . . . privacy.''

Article I, Section 2, California Constitution:

''Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.''

Section 47(3), California Civil Code:

''A privileged publication or broadcast is one made . . . In a communication, without malice, to a person interested therein . . . by one who is also interested. . . .''

Section 48a(4)(d), California Civil Code:

'' 'Actual malice' is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice.''

Statement Under Rule 28.4(c).

Since this appeal draws into question the constitutionality of Article I, Section 1 of the California Constitution and Section 47(3) of the California Civil Code, state statutes affecting the public interest, and neither the State of Cali-

fornia nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. § 2403(b) may be applicable.

Statement of the Case.

Appellee Rancho La Costa, Inc. is a corporation which operates a lavish resort in northern San Diego County, California. The resort has achieved considerable national prominence and has distinguished itself in a number of ways — both good and bad.

On the positive side, La Costa boasts an elaborate AMA-approved health spa as well as a championship golf course and excellent tennis facilities. These nationally-promoted facilities have attracted a large array of "notables" to sojourn at the resort, including well-known figures from the worlds of entertainment, politics and business. La Costa is also the annual site of a number of major golf and tennis events, including the Professional Golf Association's Tournament of Champions.

On the negative side, a major public controversy has enshrouded La Costa since it first opened its doors to the public in 1965. From La Costa's earliest days law enforcement authorities, both national and local, have expressed a keen interest in the resort as the result of the background of its principal owners and the manner in which the resort was financed. This interest quickly ripened into a series of intensive investigations into the true nature of the La Costa operation.

La Costa was founded by a group of four individuals led by Morris B. ("Moe") Dalitz. Since the 1930's, Dalitz has been reputed to be a key member of organized crime and has achieved lasting notoriety for his "achievements" in that area. For example, during the 1950's Dalitz was publicly interrogated by the Kefauver Committee of the United States Senate and was identified by that Committee as a central figure in the "Cleveland Syndicate" of organized

crime which had moved on to Las Vegas. Numerous books and articles have been written about Dalitz's "exploits," particularly with respect to Dalitz's ownership and operation of several Las Vegas casinos which were suspected of skimming money to the coffers of organized crime.

Another of La Costa's founders was Allard Roen, a protege of Dalitz from the latter's Cleveland days. Once widely considered to be a "front man" for Dalitz's Las Vegas operations, Roen was forced to plead guilty in a major stock fraud scandal in 1962.

Interest in La Costa was whetted by the fact that the resort was largely financed by massive loans (in excess of $50 million) obtained by Dalitz and his partners from the scandal-ridden Central States Pension Fund of the International Brotherhood of Teamsters. For almost two decades that Pension Fund has been the subject of continuing national controversy concerning its alleged ties to organized crime and has become the focus of numerous government investigations and criminal prosecutions.

Government officials were also aware that one of the people who helped arrange for the substantial loans to La Costa was Allen Dorfman. Dorfman has been indicted a number of times in connection with Pension Fund scandals and has been convicted of receiving kickbacks for arranging Pension Fund loans while acting as a "Special Consultant" to the Fund. Not only was Dorfman instrumental in arranging the La Costa loans, but Dorfman also became a resident of La Costa and a member of its Board of Directors.

These and other factors converged to generate an important public controversy about La Costa: Is this resort merely a glamorous hotel and spa, as La Costa trumpets to the nation through millions of dollars' worth of advertising and public relations efforts? Or does the posh veneer of the resort only camouflage the fact that La Costa is also a key meeting place for members of organized crime and their contacts in organized labor, big business and government?

Between 1965 and 1975 dozens of media publications commented on aspects of the La Costa controversy. (A few examples of those publications are set forth in Appendix F hereto.) And one of those many publications was an article entitled "La Costa" (Appendix G) which appeared in the March 1975 issue of Penthouse magazine, published by appellant Penthouse International, Ltd.[2]

Almost all of the information which appeared in the Penthouse article had already appeared in the public press over the previous ten years. Nevertheless, Rancho La Costa, Inc.[3] and its principals never sought to defend their reputations in court until the appearance of the "La Costa" article in Penthouse. In May 1975 appellees filed a libel action in Los Angeles Superior Court seeking $630 million in damages, alleging that appellants' article falsely suggested that appellees are "criminals" and "mobsters".[4]

In their answers to the complaint, appellants alleged *inter alia* that appellees were "public figures" and would therefore have to prove "actual malice." And in 1976, the Superior Court granted appellants' motion for summary judgment as to Moe Dalitz and Allard Roen, finding that those individuals "are clearly public figures under all of the authorities, and said plaintiffs have failed to show malice."

On November 2, 1979, the Superior Court ruled that the remaining plaintiffs (appellees) were likewise "public figures" as a matter of law and would therefore have to prove "actual malice" at the time of trial to prevail against ap-

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[2]Appellant Robert Guccione is the chief executive officer of the corporate publisher. Appellants Jeff Gerth and Lowell Bergman were the authors of the Penthouse article.

[3]The five corporate appellees are hereinafter collectively referred to as Rancho La Costa, Inc.

[4]Appellees were joined in the action by Mr. Dalitz and Mr. Roen.

pellants (A-2).[5] The Superior Court also ruled that, in the absence of the federal privilege, appellants would nevertheless be entitled to the protection of a qualified privilege provided in Section 47(3) of the California Civil Code, which had frequently been applied to media publications concerning matters of legitimate public interest (A-1).[6]

Appellees sought immediate relief from the 1979 rulings of the Superior Court by commencing an original proceeding for a writ of mandate in the California Court of Appeal. The writ was granted and the rulings of the Superior Court were vacated by the Court of Appeal in a judgment issued on June 6, 1980.

The judgment of the Court of Appeal included the following holdings:

(1) Appellants had failed to establish that appellees are public figures because appellants had failed to prove the *truth* of the alleged libel (B-20);

(2) The determination of public figure status is a question of "fact" for the *jury* rather than a question of law for the court (B-5, 27-28);

(3) If the jury concludes that appellees are not public figures, appellees may recover a judgment from appellants on the basis of *strict liability* (27, 28);

(4) Even if appellees are found to be public figures, they may nonetheless recover a judgment if they can prove common law-type malice (B-28).

These holdings, which are directly contrary to the prior decisions of this Court, were buttressed by the Court of Appeal's conclusion that appellants' First Amendment rights

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[5]Appellants' 1979 motion to the trial court did not involve the issue of appellees' ability to prove malice. The motion was the California equivalent of a motion for partial summary judgment (cf. Rule 56 F.R.Civ.P.) and merely sought a pretrial adjudication of appellees' status as public figures.

[6]The qualified privilege provided in Section 47(3) is defeasible by proof of common law-type malice and would not, therefore, control the decision in any case wherein the plaintiffs are found to be public figures.

must yield to appellees' right of *privacy* under the California Constitution. The Court of Appeal stated:

> "[T]he right of privacy [in the California Constitution] is paramount to the right of free speech when in the exercise of free speech a defendant violates another's privacy by uttering a defamatory lie about him. The right of free speech guaranteed by the state and federal Constitutions does not permit violation of the right of privacy." (B-26)

In addition, the Court of Appeal withheld from appellants the benefit of the qualified privilege set forth in Section 47(3) of the California Civil Code on the grounds that the statutory privilege is available only to "local", not "national", publications. (B-23)

After appellants' petition for rehearing was denied by the Court of Appeal (C-1), appellants unsuccessfully petitioned for a hearing before the California Supreme Court (D-1).

The Questions Are Substantial.

This appeal presents several critical issues concerning the rights of a national magazine and its contributors to federal constitutional protection in a libel action before a state court.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court attempted to strike a balance between the public's need for a "vigorous and uninhibited press" and the individual's need for compensation for the harm inflicted by defamatory falsehood. While recognizing the "legitimate state interest underlying the law of libel," this Court concluded that the First Amendment proscribed the imposition of strict liability upon media defendants in such actions. *Id.* at 341-342.

This Court also reaffirmed in *Gertz* two important principles first enunciated in *New York Times v. Sullivan*, 376 U.S. 254 (1964). This Court made clear that the liability of media defendants in libel actions cannot be made to turn solely on the defendants' ability to prove the *truth* of the alleged libel. And in cases involving public figures or public

officials, this Court declared that the standard of liability shall be the federal "actual malice" standard announced in *Sullivan*. 418 U.S. at 341-343.

In the instant case, the Court of Appeal of California has sought to upset the balance struck by this Court in *Gertz* in several fundamental respects. Not only has the California court resurrected the spectres of strict liability and common-law malice in defamation actions against media defendants, but the judgment of the Court of Appeal has also made the applicability of federal privilege turn on the defendants' ability to prove the truth of the alleged libel.

The judgment of the California Court of Appeal raises substantial questions with respect to the present posture of the rights of the press under the First Amendment. This Court has not affirmed a public figure determination since the constitutional privilege was first established in 1967 in the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130. And although the philosophical basis of the decisions in *Butts* and *Walker* was ostensibly reaffirmed by this Court seven years later in *Gertz*, several commentators and courts have construed the more recent decisions of this Court[7] as steadily reducing the substantial protections for the press espoused in the Court's earlier decisions.[8]

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[7]*Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157 (1979).

[8]See, e.g., Emerson, First Amendment Doctrine and the Burger Court, 68 Cal. L. R. 422 (1980); Greenfield, Defamation and the First Amendment in the 1978 Term: Diminishing Protection for the Media, 48 U. Cin. L. R. 1027 (1979); *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (Oregon Supreme Court, 1979) [concluding that Wally Butts would no longer be considered a public figure by this Court]; *Vegod Corp. v. American Broadcasting Companies, Inc.*, 25 Cal. 3d 763, 603 P.2d 14, 160 Cal. Rptr. 97 (California Supreme Court, 1979), *cert. denied*, ... U.S. .... (1980) [concluding that this Court would not extend First Amendment protection to public comment concerning commercial controversies].

At the same time, this Court has also affirmed recent attempts of state courts to give broader effect to state constitutional provisions. See, *e.g.*, *PruneYard Shopping Center v. Robins*, 64 L. Ed. 2d 741, 758 (1980): "[T]he Court's decision . . . is a part of a very healthy trend of affording state constitutional provisions a more expansive interpretation than this Court has given to the Federal Constitution." (Opinion of Marshall, J., concurring.)

Now the California Court of Appeal has apparently interpreted these recent "trends" as providing a license for rewriting the law of libel in the State of California under the authority of a state constitutional provision protecting *privacy*. The judgment of the Court of Appeal effectively denies appellants — and all media defendants in California — the protection of the First Amendment in this area of the law. Moreover, that protection has here been denied in an area where the public's need for a "vigorous and uninhibited press" is perhaps the greatest — the investigation and exposure of organized crime.

The judgment of the Court of Appeal also denies appellants the protection of a qualified privilege provided by California state law (Section 47(3) of the California Civil Code) on the unprecedented and discriminatory ground that the privilege is available only to "local" media publications, not to "national" publications such as appellants'.

Because of the constitutional significance and potential widespread impact of the California court's judgment, this appeal, which falls within this Court's mandatory jurisdiction, warrants plenary review.

I.

THE JUDGMENT OF THE COURT OF APPEAL IS IN DIRECT CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT.

A. The Requirement That Appellants Prove the Truth of the Alleged Libel in Order to Obtain the Benefit of Their First Amendment Privilege.

The clearest holding in the judgment of the Court of Appeal may also be the most astonishing.

The heart of appellees' libel claim is the allegation that the Penthouse article falsely portrays appellees as "mobsters" and "associates of mobsters." The truth of these alleged libels, however, was irrelevant to the determination of appellees' status as public figures. In light of this Court's decisions in *Sullivan* and *Gertz*, the only question before the trial court was the extent of appellants' First Amendment privilege in reporting on the controversy surrounding appellees, not the truth of either position in that controversy.

The Court of Appeal, however, disagreed with these settled principles. Ignoring the constitutional pronouncements of this Court in *Sullivan* and *Gertz*,[9] the California appellate court vacated the trial court's public figure determination on the ground that appellants had failed to offer first-hand evidence of the truth of the alleged libels — *i.e.*, that appellees are in fact "mobsters" and "associates of mobsters." The California court stated:

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[9]Both *Sullivan* and *Gertz* are discussed at length in the opinion of the Court of Appeal (B-7-11), but nowhere in the opinion does the California court refer to the central thesis of those decisions — that the First Amendment protects the publication of false statements of fact. Instead, the state court merely quotes this Court's statement in *Gertz* that "there is no constitutional value in false statements of fact." (B-10) The Court of Appeal thus conveniently ignores the following paragraph in *Gertz* wherein this Court made clear that "The First Amendment [nevertheless] requires that we protect some falsehood in order to protect speech that matters." 418 U.S. at 341.

> "[I]t is clear to us that the evidence [supporting the public figure determination] is legally insufficient. . . . [O]n the specific question of the status or character of the plaintiffs as 'mobsters', 'gangsters', 'crooks', and 'associates' of crooks and mobsters, etc. the 'evidentiary' material is '99 and 44/100's%' pure hearsay. . . . There is no primary non-hearsay evidence of criminality of the remaining corporate or individual plaintiffs." (B-20)

In so holding, the Court of Appeal succeeded in eviscerating the very protection which the public figure privilege was designed to provide media defendants. As this Court stated in *Gertz:*

> "Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. . . . The First Amendment requires that we protect some falsehood in order to protect speech that matters." 418 U.S. at 340-341.

Of course, there is nothing appellees would like better than forcing appellants to prove the truth of the alleged libels. The elusive and clandestine nature of organized crime would make it especially onerous to compel appellants to prove the truth of the subject libels. As this Court accurately observed in *Sullivan:*

> "Even courts accepting this defense [of truth] as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars." 376 U.S. at 254.

Indeed, by requiring appellants to offer "primary non-hearsay evidence of criminality" in order to obtain the benefit of appellants' First Amendment privilege, the California court has rendered that privilege totally illusory.

Moreover, having found that appellants' evidence was "legally insufficient," the Court of Appeal refused to review *any part* of the considerable evidentiary record which

appellants had submitted to the trial court.[10] The Court of Appeal stated:

> "Admittedly, in this case the amount of evidence presented to the trial court in support of the motion was extremely voluminous. . . . We have not personally examined this mass of documentary evidence." (B-19, 20)

Thus, if this Court will review only the small sampling of publications annexed to this Jurisdictional Statement in Appendix F, this Court will have reviewed more of appellants' public figure evidence than the Court of Appeal ever bothered to "personally examine."[11]

The refusal of the Court of Appeal to review appellants' evidence also led to a number of surprising and unfounded comments by the state court. For example, early in its opinion, the Court of Appeal court mimicked the words of this Court in *Wolston v. Reader's Digest Assn., Inc., supra,* by suggesting (in *dicta*):

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[10]The affidavit of appellants' attorney, Jewel Bjork, referred to in the opinion of the Court of Appeal (B-19), was *not* part of appellants' formal public figure evidence. That affidavit was submitted to the trial court solely as a guide to the voluminous, evidentiary proofs offered by appellants.

Appellants' formal evidence was officially designated as part of appellees' record in support of their petition for a writ of mandate and was therefore at the Court of Appeal's disposal. However, this evidence — which was stored in a large (locked) file cabinet and in several additional transfiles in the Superior Court courthouse — was never summoned by the Court of Appeal and never left the chambers of the trial court. Thus the Court of Appeal never even *looked at* appellants' evidence.

[11]Appellants' evidence did not consist solely of other media publications. While such publications clearly delineated the nature, scope and history of the La Costa controversy in a competent, non-hearsay manner, appellants' evidence also contained numerous deposition transcripts, affidavits, authenticated public documents and party admissions, all of which constituted competent evidence of "the nature and extent of [appellees'] participation in the particular controversy giving rise to the defamation." *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 353.

> "At bench there is no public controversy or debate over the 'desirability' of 'organized crime.' All conscientious and responsible citizens are opposed to it. There was no 'controversy' over La Costa itself. At most it was a matter of limited press interest. The creation of a large resort-spa and attend facilities created no 'public controversy.' " (B-14)

The publications set forth in Appendix F unmistakably demonstrate that La Costa has hardly been a subject of "*limited* press interest." Media publications all across the country had commented on the La Costa controversy over a period of more than a decade prior to the date of the Penthouse article, and similar public comments continued unabated even after appellees had filed their $630-million lawsuit herein in an attempt to chill such comment. Thus on August 18, 1975, *Newsweek* magazine described La Costa as "The most dazzling monument to this bond between the Teamsters and organized crime. . . ." (F-19). And, on October 13, 1975, *The New York Times* stated in one of its editorials:

> "La Costa itself is emblematic of the ties that have long made law-enforcement officials worry about the links between the teamsters and organized crime. Much of the resort's financing comes from the $1.4-billion Teamsters' Central States pension fund, and underworld figures are prominent among its owners and habitues." (F-20)

Similarly, Appendix F also belies the Court of Appeal's comment that "There was no 'controversy' over La Costa itself." To suggest that La Costa is just another "resort-spa" is tantamount to suggesting that Watergate was just another office building.

The conscious refusal by the Court of Appeal to review the evidence supporting appellants' First Amendment claims constituted a violation of the state appellate court's constitutional responsibility under *New York Times Co. v. Sullivan, supra,* 376 U.S. at 285, and resulted in a denial of appellants' right to due process under the Fourteenth Amendment.

B. The Determination of Public Figure Status as a Question of "Fact" for the Jury.

After effectively destroying appellants' First Amendment privilege by holding that appellants must offer "primary non-hearsay evidence" of the *truth* of the alleged libel before it can be determined whether appellees are public figures, the Court of Appeal proceeded to provide explicit instructions as to how appellees' libel action must be tried in the superior court.[12]

First, the Court of Appeal became the first American court to hold that the determination of public figure status is a question of "fact" for the *jury* rather than a question of law for the *court*.

> "In summary, we conclude that there remain factual questions to be tried. Either party is entitled to a trial by jury on these issues of fact, if a jury has been properly requested. . . . Defendants are still entitled to prove if they can the *fact* that plaintiffs are public figures." (B-27, 28; emphasis in original).

By holding that this determination is a question of "fact," the Court of Appeal has made it impossible for any media defendant in California to obtain a *pre-trial* adjudication of this issue in any case wherein the plaintiff merely disputes the "fact" that he or she (or it, as in this case) is a public figure and requests a jury trial on the issue.

Obtaining a pre-trial adjudication of the applicability of the First Amendment privilege is, of course, vitally important to media defendants. An early determination of the privilege issue defines the parameters of both the trial of the action — *i.e.*, whether the defendants will have the considerable protection of the *New York Times* malice standard — and pre-trial discovery. Indeed, it is necessary to define those parameters at an early state of litigation in order

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[12]Such instructions appear to be binding upon the trial court under California law. See *Overstreet v. County of Butte*, 57 Cal. 2d 504, 507 (1962).

to enable the trial judge to provide the type of sensitive control over pre-trial discovery issues which this Court has encouraged. See *Herbert v. Lando*, 441 U.S. 153 (1979). As the Fifth Circuit Court of Appeals has recently observed:

> "In a defamation case, the question of public figure status is pervasive, and it should be answered as soon as possible." *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 723 (5th Cir. 1980).[13]

Moreover, if media defendants are unable to obtain a pre-trial adjudication of "disputed" public figure status, the important remedy of summary judgment will be rendered totally unavailable even in those cases where there is clearly no triable issue of fact as to the defendants' actual malice.

In addition, media defendants in California will no longer be protected from "the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers." *Rosenblatt v. Baer*, 383 U.S. 75, 88 n.15 (1966). As one commentator has recently observed:

> "[U]nder this approach [of allowing the jury to decide the public figure issue], an appellate court would be compelled to affirm any reasonable jury decision. As a consequence, effective appellate review will be foreclosed in exactly those areas where constitutional protection of unpopular ideas and their advocates is most sorely needed." Scanlon, The Applicability of the Constitutional Privilege to Defame: Question of Law or Question of Fact?, 55 Indiana L. J., 389, 404 (1980).

No decision of this Court has ever suggested that the determination of the public figure issue might properly be

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[13]The *Miller* case, which still awaits trial, was pending more than eight years before the Fifth Circuit finally stepped in to determine the applicability of the defendants' First Amendment privilege in that action. In the subject action, it took appellants four and one-half years to persuade the California Superior Court to finally resolve the same issue — only to have that determination vacated by the Court of Appeal and deferred until *after* trial of the issue before a jury.

made by a jury, even when this Court has disagreed with the conclusion of a lower court concerning the "voluntary" nature of a defamation plaintiff's involvement in a given public controversy. See, *e.g., Wolston v. Reader's Digest Ass'n., supra*. On the contrary, this Court has uniformly treated the privilege question as a legal issue. Such uniform treatment strongly suggests that this Court already considers such treatment to be an element of the "strategic protection" provided by the First Amendment in defamation actions. See *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 342.

The treatment of public figure status as a question of *law* not only allows for more effective appellate review of this difficult and sensitive constitutional issue but will also provide for more consistent, impartial treatment of the applicability of the constitutional privilege among the various states. As noted by Scanlon, *supra,* at 403:

> "Both judges and commentators have found the Court's language [on the subject of who is a public official or public figure] difficult to apply. . . . It is submitted that jurors, without the opportunity to sift through the reported cases and consider the particular facts and nuances of the various statements of the standard, would be at a substantially greater disadvantage."

Moreover, if individual states like California can arbitrarily decide to treat this constitutional issue as a question of "fact," defamation plaintiffs will be encouraged to engage in forum shopping when seeking to sue national publications. Again Scanlon, at 400:

> "If the privilege is to function properly as an instrument of 'national constitutional protection,' the rules which allocate the roles of the judge and jury must be uniform in statement and application."

By holding that appellees' public figure status must be tried before a jury, the California Court of Appeal has denied appellants another basic protection which the First Amendment privilege was designed to provide.

C. Strict Liability, Common Law Malice, and California's "Paramount" Right of Privacy.

The Court of Appeal also instructed the trial court as to the standard of care which would be applied to appellants in the absence of a jury finding that appellees are public figures. And here the court reached the astonishing conclusion that appellees may recover a judgment *without any proof of fault* on the part of appellants. The Court of Appeal stated:

> "The plaintiffs are entitled to recover if they can prove (1) the publication of a libelous statement, and (2) damages arising therefrom." (B-27, 28)

Nowhere is it noted in the opinion of the Court of Appeal that this Court proscribed the imposition of strict liability upon media defendants in defamation actions in *Gertz v. Robert Welch, Inc., supra*. Instead, in the midst of its discussion of *Gertz*, the Court of Appeal reached the unprecedented conclusion that the right of a private individual to seek redress for defamation in California is grounded in California's state constitutional protection for *privacy:*

> "More significantly, in California this right of privacy . . . is expressly set forth in article I, section 1 of the state Constitution." (B-10)

This conclusion is reiterated in the Court of Appeal's instructions as to how appellants' libel action must be tried. There the Court of Appeal makes it clear that in order for appellants to "prove" that appellees are in "fact" public figures, appellants must convince a jury that appellees "willingly . . . relinquished their rights of privacy." (B-28)

It is thus apparent that the substantial changes in First Amendment law wrought by the Court of Appeal — including both the imposition of strict liability and the requirement that appellants offer evidence of the truth of the alleged libel in order to avoid such strict liability — are the result of the Court of Appeal's protection of appellees' right

of privacy under the California Constitution. It is also apparent that the Court of Appeal felt itself free to restructure the law of libel in California, for the court states at one point:

> "Plaintiffs as private individuals are entitled to the protection of their right of privacy. That right is entitled to redress when violated. Under the mandate of the recent federal Supreme Court rulings, the right of privacy is paramount to the right of free speech when in the exercise of free speech a defendant violates another's privacy by uttering a defamatory lie about him. The right of free speech guaranteed by the state and federal Constitutions does not permit violation of the right of privacy." (B-26)

This extraordinary pronouncement makes it clear that the Court of Appeal has failed to recognize that this Court has already defined the *maximum* protection which states may provide for private reputational interests in view of the First Amendment. By expanding the rights of a defamation plaintiff beyond those permitted by *Gertz*, the California court has *reduced* the rights of media defendants below that *minimum* level of protection mandated by the United States Constitution. Such a decision, even if based upon a state constitutional provision, cannot be allowed to stand under the Supremacy Clause.

The decision of the Court of Appeal herein is far different than the decision of the California Supreme Court in *Robins v. PruneYard Shopping Center*, 23 Cal. 3d 899 (1979), *affirmed* 64 L. Ed. 2d 741 (1980). In the latter case, the California Court admittedly expanded a state constitutional right in such a fashion as to diminish federally-protected (property) rights. However, in *PruneYard* the California court was not confronted with any prior decision of this Court defining the outer limits of *state-created* rights of free speech under the circumstances presented therein.[14]

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[14]In *Lloyd v. Tanner*, 407 U.S. 551 (1972) — the decision immediately confronting the California Supreme Court in *PruneYard* — this Court merely balanced two competing federal rights, not a federal right vis-a-vis a state-created right. See *PruneYard Shopping Center v. Robins, supra*, 64 L. Ed. 2d at 752.

By contrast, the decisions of this Court in *Gertz* and *Firestone* did prescribe the *maximum* protections which a state may constitutionally provide for private reputational interests in the context of defamation actions against media defendants. And the California Court of Appeal has clearly overstepped those boundaries in this case.

The overstepping by the Court of Appeal is further demonstrated by the state court's holding that even if appellants are unsuccessful in overcoming the multifarious obstacles placed in their path to "proving" that appellees are public figures, appellees may nonetheless recover a judgment if they can

> "prove that the publication was made with malice as that term is defined *under California law* . . ." (B-28, emphasis added)

Under California law, malice is defined in the common-law sense, focusing on the defendant's ill will toward the plaintiff.[15] The Court of Appeal therefore clearly rejected the *federal* constitutional standard of "actual malice" first established by this Court in *New York Times Co. v. Sullivan, supra.*

The judgment of the California Court of Appeal is also in direct conflict with this Court's decision in *Time, Inc. v. Hill,* 385 U.S. 374 (1967). In *Hill,* this Court made it clear that a state-created right of *privacy* could not be "paramount" to the First Amendment, and that such privacy interests must yield to the obligation and right of media defendants to publish articles concerning matters of legitimate public interest.

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[15]Section 48(a)(4)(d) of the California Civil Code defines "actual malice" as

> "that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice."

In this case, the California court has explicitly acknowledged that the Penthouse article concerned matters of legitimate public interest (B-8). Nevertheless, the Court of Appeal has held that appellants' federal Constitutional right to publish the subject article must yield to appellees' state right of *privacy*.

The Court of Appeal's aggrandizement of appellees' right of privacy is all the more incongruous in view of the fact that five of the seven appellees are *corporations*. It is one thing to suggest generally that a corporation has as much of a right to recover for defamation as a natural person, but it is quite another thing to hold that a corporation's right of "privacy" can constitute a "paramount" state interest under the circumstances presented herein. *Cf., United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ["corporations can claim no equality with individuals in the enjoyment of a right to privacy"].

This Court has never considered the application of the public figure doctrine to *corporate* defamation plaintiffs. Here, however, the California Court of Appeal has not only held that corporations must be treated no differently than natural persons in this regard (B-16), but the state court has also upheld such non-differentiation in connection with the "personal" right of *privacy*.

In sum, the judgment of the California Court of Appeal is repugnant to the federal Constitution in every sense. Under the guise of enforcing a tangentially-relevant state constitutional provision, the California court has effectively stripped appellants of their rights under the First Amendment. This unprecedented elevation of appellees' state-created right of privacy to a position "paramount" to appellants' federally-protected right to publish cannot be allowed to stand.

D. Statutory Discrimination Against "National" Publications.

Appellants' motion for summary adjudication before the trial court also requested a judicial determination of the applicability of a California statutory privilege, Section 47(3) of the California Civil Code, to appellants' publication. Section 47(3) provides in relevant part:

> "A privileged publication or broadcast is one made . . . In a communication, without malice, to a person interested therein . . . by one who is also interested."

The trial court, following a long line of California appellate decisions interpreting Section 47(3) to apply to media publications concerning matters of legitimate public interest, held that the privilege applied to appellants' publication as a matter of law. (A-1; Rulings 1-3)

The Court of Appeal vacated this ruling too, finding instead that the protection of Section 47(3) is available only to "local" publications. The Court of Appeal stated:

> "The strictly limited statutory qualified privilege is inapplicable to a defamatory article published at large to a vast audience in a national magazine." (B-23)

No policy considerations were offered by the Court of Appeal to explain why a facially neutral statute was suddenly being interpreted to distinguish between "national" and "local" publications, nor was any prior authority cited by the court in support of such an irrational and discriminatory distinction. In fact, an earlier California decision had expressly held the statutory privilege to be applicable to an article appearing nationally in the Saturday Evening Post. See *Harris v. Curtis Publishing Co.*, 49 Cal. App. 2d 340 (1942). Thus the Court of Appeal's decision on this point was totally unexpected.

While the reinterpretation of state law by state courts is not usually a matter of federal concern, cf., *Garner v. Louisiana*, 368 U.S. 157, 169 (1961), a substantial federal question is nevertheless presented when the new statutory

interpretation infringes upon federally protected rights. See *Cohen v. California,* 403 U.S. 15 (1971).

As the Court of Appeal's unprecedented interpretation of Section 47(3) was totally unanticipated by appellants, appellants were not able to challenge the constitutionality of the new construction until after the court had rendered its judgment. See *Missouri ex rel. Missouri Ins. Co. v. Gehner,* 281 U.S. 313, 320 (1929).

In appellants' petition for rehearing before the Court of Appeal, appellants pointed out that the court's surprising decision on this issue effectively denied appellants equal protection under the laws of California. This argument was subsequently repeated in appellants' petition for a hearing before the California Supreme Court, wherein appellants urged:

> "The [Court of Appeal's] interpretation of Section 47(3) not only finds no support in the language of the statute but also constitutes a wholly arbitrary classification of privileged communications, which violates defendants' right to equal protection of the law under the California and United States Constitutions."

Both of appellants' petitions, however, were summarily denied. (C-1, D-1)

By suddenly construing the state statutory privilege in an unconstitutionally discriminatory manner so as to preclude application of the privilege to appellants' publication, the Court of Appeal once again denied appellants the protection of the federal Constitution. *Cf., Orr v. Orr,* 440 U.S. 268 (1979).

II.

THE LA COSTA CONTROVERSY AROSE AS THE DIRECT RESULT OF THE VOLUNTARY AND PURPOSEFUL CONDUCT OF THE APPELLEES, AND APPELLANTS' PUBLICATION CONCERNING THAT CONTROVERSY MUST BE PROTECTED BY THE FIRST AMENDMENT.

No decision of this Court has yet considered investigative reporting of organized crime in the context of the First Amendment.

It is difficult to conceive of any area where the media has a greater responsibility to inform the public or where the public has a more compelling "need to know." The clandestine activities of organized crime permeate our entire social fabric and strike at the heart of our political system. Democracy ultimately rests upon the strength of the rule of law and the wisdom of an informed electorate, and our political system is clearly threatened by any element which would put itself outside our laws and seek to conceal its activities behind a veil of strict secrecy.

The elusive nature of organized crime makes it especially onerous to compel publishers to rely upon their ability to prove the truth of an alleged libel as their sole means of avoiding liability for an alleged falsehood. If the State of California can successfully deny First Amendment protection to investigative reporting in this area, such reporting will quickly cease and self-censorship will be a virtual certainty rather than a speculative possibility. Where the light is needed the most, it will be supplied the least.

Both the corporate and individual appellees in this case claim to have been "dragged" into a public controversy against their wills. They urge that they should not be deemed public figures because they did not "voluntarily" seek to become embroiled in the public controversy which has surrounded their resort for fifteen years. Appellees claim that they have deliberately shunned all the *unfavorable* publicity surrounding their controversial activities, and they argue that the press has no right to question the legitimacy of those activities.

Ironically, appellees' arguments have now been aided by the judgment of the California Court of Appeal holding appellees' state-created right of *privacy* to be "paramount" to the rights of the press under the First Amendment. The California court has failed to appreciate that for members of organized crime and those who do their bidding, maintaining "privacy" is a matter of survival rather than choice.

If such individuals are allowed merely to "choose" not to become public figures, they will thereby be able to avoid public scrutiny of their voluntary activities, and the American public will be denied critical information concerning one of the gravest ongoing threats to our system of ordered liberties.

It is much more meaningful to ask whether the individual appellees (Adelson and Molasky), by reason of their *voluntary activities*, might be assumed to have exposed themselves to "increased risk of injury from defamatory falsehood." See *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976). And it is clear that the individual appellees' voluntary course of conduct has not only invited considerable public attention and comment but has also spawned a legitimate and important public controversy concerning the nature of the La Costa resort. The voluminous and uncontroverted record developed by appellants — which the Court of Appeal refused to review — leaves no doubt that appellees have "thrust themselves" into the subject controversy by virtue of their own voluntary activities and have thereby become public figures.[16]

Moreover, the individual appellees could reasonably have expected to have become subject to unfavorable public comment because of their central position in the La Costa controversy. Besides being founders and principal owners of the resort, Adelson and Molasky have been president and vice-president of Rancho La Costa, respectively. And the trial court appropriately concluded that each of these individuals, "by virtue of his voluntary involvement as an

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[16]It is less meaningful to discuss the "voluntary" nature of the activities of the *corporate* appellees. Nevertheless, it is apparent that the corporate appellees must necessarily be deemed public figures for the limited purpose of protecting discussion of the public controversy which has surrounded the La Costa resort since its inception; otherwise, public discussion of that important controversy would be rendered virtually impossible and the very purpose of the First Amendment privilege would be completely frustrated.

officer, founder and defender of Rancho La Costa, Inc., is a public figure with respect to the publications concerning the controversy surrounding La Costa." (A-2)[17]

Indeed, the evidence before the trial court made it clear that the individual appellees had *in fact* assumed the risk of such comment. For example, it was admitted at deposition that Adelson and Molasky had voluntarily associated with Mr. Dalitz in more than twenty-five business ventures (including La Costa) over the previous twenty years. And it was further admitted that appellees had accepted the obvious risks inherent in such an association. As Adelson stated quite candidly:

> "He [Dalitz] has been under investigation for many, many years for a long, long time. I imagine the files on him are thick by this time. There is no sense kidding ourselves, the man has been under investigation. . . . I'm sure, hundreds of agents . . . have investigated this man in every way they know how."[18]

In addition, there was considerable evidence before the trial court that appellees might also be considered "general purpose" public figures. The voluminous proofs before the court certainly left no doubt that the corporate appellee, Rancho La Costa, Inc., had achieved an unquestionable degree of national fame and notoriety. For example, the "shoebox" referred to in the opinion of the Court of Appeal

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[17]In a similar fashion, this Court found Wally Butts to be a public figure "by [virtue of his] position alone," even though Butts did not "voluntarily" become embroiled in the controversy surrounding his purported activities. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967). See also, *Waldbaum v. Fairchild Publications, Inc.*, 5 Med. L. Rptr. 2629, 2636 (D.C. Cir.), *cert. denied* .... U.S. .... (1980) ["The plaintiff either must have been purposely trying to influence the outcome or could reasonably have been expected, because of his position in the controversy, to have an impact on its resolution."

[18]As the trial court later stated, after reviewing the Court of Appeal's decision: "I felt that the conscious, knowing, voluntary, eager association with [Dalitz and Roen] in business . . . made Adelson and Molasky public figures. In the absence of this particular decision [by the Court of Appeal], I still think so. But Galileo had his views too."

(B-21) was actually a box full of more than 550 media clippings (concerning appellees) which had been amassed by appellees themselves between 1970 and 1974.

Appellees Adelson and Molasky had also achieved considerable independent notoriety as two of the premier real estate developers in Las Vegas and as principals in a major Hollywood production company, Lorimar, Inc. — the producer of such television shows as "The Waltons" and "Eight is Enough." Moreover, the pervasive influence of the individual appellees could not be discounted. As Adelson admitted:

> "We've met senators and governors and judges and whatever. We meet everybody by name and are introduced to them . . . We have a lot of friends and our circle of acquaintanceships is much larger than the ordinary person who is not exposed to that kind of thing."

Furthermore, appellees have long had the benefit of unparalleled access to the media which could be used (and, in fact, *was* used) to counteract unfavorable public comments directed at them. Thus in their earlier days, when appellees faced similar unfavorable publicity in connection with one of their first Las Vegas deals with the Teamsters Central States Pension Fund, appellees mobilized a major public relations firm to inform the public of appellees' side of the story. Several years later appellees called upon the same firm to mount a counter-attack directed at the Penthouse article — including a well-attended, nationally-reported press conference to voice appellees' reactions to the article and to announce to the world the filing of their $630-million libel action.

As appellee Adelson admitted at deposition, Rancho La Costa, Inc. utilizes the services of at least three public relations firms in an effort to promote a positive image for the resort in the national press. La Costa also employs in-house public relations personnel. La Costa's public relations

budget for 1974 alone was admitted to be $250,000 — which sum was fully expended.

Acceptance of appellees' self-characterization as "involuntary" participants in the controversy and as "private figures" would lead to the untenable result that no person who has ever been identified as an "organized crime figure" could ever be deemed a public figure. Such individuals routinely shun publicity — especially when that publicity concerns their own controversial activities. If these individuals could not be deemed public figures under the First Amendment, the important right and *duty* of the press to inform the public about the activities of such people would be vitiated. As the Fifth Circuit Court of Appeals has perceptively stated in another recent decision involving reputed organized crime figures:

> "In our view of the law resulting from the inevitable collision between First Amendment freedoms and the right of privacy, the status of public figure *vel non* does not depend upon the desires of an individual. The purpose served by limited protection to the publisher of comment upon a public figure would often be frustrated if the subject of the publication could choose whether or not he would be a public figure. Comment upon people and activities of legitimate public concern often illuminates that which yearns for shadow. It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be. It is sufficient, as the district court found, that '[the plaintiff] voluntarily engaged in a course that was bound to invite attention and comment.' " *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 861 (5th Cir. 1978).[19]

Organized crime never has and never will seek publicity or deliberately make any move for the purpose of arousing public attention or controversy. As noted earlier, maintain-

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[19]Coincidentally, the alleged defamatory passage in the *Rosanova* case referred to the plaintiff's presence at an enclave of organized crime figures taking place at *La Costa*. See 411 F.Supp. at 442.

ing "privacy" is a matter of survival rather than choice for members of organized crime. Such individuals will therefore be aided immeasurably in their attempts to avoid public scrutiny and accountability if the State of California is permitted to hold their "privacy" right to be "paramount" to the interests and values protected by the First Amendment.

Conclusion.

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

DATED: November 25, 1980

Respectfully submitted,

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APPENDIX A.

Superior Court of the State of California
for the County of Los Angeles

No. C 124 901

RANCHO LA COSTA, INC., etc., *et al.*,

Plaintiffs,

vs.

PENTHOUSE INTERNATIONAL, LTD., etc., *et al.*,

Defendants.

Summary Adjudication of Issues (CCP §437c): Order.

The motions of defendants Penthouse International, Ltd., Robert Guccione, Jeff Gerth and Lowell Bergman for an order adjudicating legal issues came on regularly for hearing on October 18, 1979 in Department 64 of the above-entitled Court, the Honorable George M. Dell, Judge presiding. Michael J. Silverberg and John A. Dito appeared as attorneys for plaintiffs and Norman Roy Grutman, Jewel H. Bjork and Carl W. Shapiro appeared as attorneys for defendants. After full consideration of moving and responding papers, all supporting papers and the oral argument of counsel, the Court makes the following adjudications of law:

1. Section 47(3) of the California Civil Code affords a qualified privilege to media publications concerning matters of legitimate public interest.

2. Defendants' publication of the article entitled "La Costa" concerns matters of legitimate public interest.

3. Defendants' publication of said article is protected by a qualified privilege set forth in Section 47(3) of the California Civil Code.

4. A corporation can be a public figure under the First Amendment to the United States Constitution.

5. Plaintiff Rancho La Costa, Inc., has been a subject of legitimate public controversy.

6. Plaintiff Rancho La Costa, Inc. is a public figure under the First Amendment to the United States Constitution.

7. Plaintiff Merv Adelson, by virtue of his voluntary involvement as an officer, founder and defender of Rancho La Costa, Inc., is a public figure with respect to publications concerning the controversy surrounding La Costa.

8. Plaintiff Irwin Molasky, by virtue of his voluntary involvement as an officer, founder and defender of Rancho La Costa, Inc., is a public figure with respect to publications concerning the controversy surrounding La Costa.

At the trial of this action, the issues specified above shall be deemed established and the action shall proceed to the issues remaining.

IT IS SO ORDERED.

Dated: November 20, 1979.

GEORGE M. DELL,
Judge of the Superior Court

APPENDIX B.

In the Court of Appeal of the State of California
Second Appellate District
Division Two

2 Civil No. 58487
(Super. Ct. No. C 124901)

June 6, 1980

RANCHO LA COSTA, INC., a Nevada Corporation; LA COSTA LAND COMPANY, an Illinois Corporation; LA COSTA MANAGEMENT COMPANY, a California Corporation; LA COSTA COMMUNITY ANTENNA SYSTEM, INC., a California Corporation; PARADISE HOMES,INC., a California Corporation; MERV ADELSON and IRWIN MOLASKY,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent,

PENTHOUSE INTERNATIONAL, LTD., a Corporation; ROBERT GUCCIONE; LOWELL BERGMAN and JEFF GERTH,

Real Parties in Interest.

Opinion of the Court of Appeal.

BEACH, J.—

NATURE OF PROCEEDINGS:

Plaintiffs in a libel action seek from this court a writ of mandate to compel the trial court to vacate its order of summary adjudication that plaintiffs are public figures and that the defendants' publication was privileged under Cal-

ifornia Civil Code section 47, subdivision 3.* We grant the writ.

HISTORY:

The plaintiffs are five corporations and four individuals.[1] For simplicity, the corporate plaintiffs will be referred to collectively as the singular La Costa. The four individual plaintiffs, Merv Adelson, Irwin Molasky, Allard Roen and Mo Dalitz, were the organizers, creators and officers of the corporate plaintiffs.

In March 1975, real parties in interest (defendants) published an article on its face libelous of plaintiffs. The article accused the owners of the resort known as La Costa, including plaintiffs Adelson, Molasky, Roen and Dalitz, who were mentioned by name, of being mobsters, gangsters, members of organized crime and charged that the La Costa resort itself is an organized crime headquarters. The article sought to implicate plaintiffs in the "Watergate" scandal, nationwide bank failures, securities frauds totaling $50 *billion*, criminal misuse of Teamster monies and pension funds and swindle of many others including churches.

After the complaint for libel was filed in 1975, defendants also in 1975 filed their motion for summary judgment. The basis of defendant's motion was that: (1) plaintiffs are public figures and that defendants are therefore entitled to a privilege deriving from the First Amendment of the United

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*For brevity, hereafter referred to as Civil Code section 47(3) or section 47(3).

[1]Two plaintiffs Dalitz and Roen were "dismissed as plaintiffs" by a prior order. The basis thereof was that they were public figures who could not show malice by defendants. At the time of the renewal by defendants of the motion for summary judgment before Judge Dell, there appears to have been a motion for "reinstatement" of Roen as a plaintiff. This was denied. The issue is not before us on the present petition.

States Constitution, and (2) defendants' publication is protected by the qualified privilege set forth in section 47(3) of the California Civil Code.

On November 19, 1975, Judge LeSage, who heard the motion, made his "Memorandum Opinion and Order" that "[t]he evidence is overwhelming that the corporate plaintiff, La Costa, and the individual plaintiffs are public figures, and that the La Costa story is a matter of general or public interest within the rules of *New York Times v. Sullivan,* 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412]; *Curtis Publishing Co. v. Butts,* 388 U.S. 130 [18 L.Ed.2d 1094, 87 S.Ct. 1975]; and *Rosenbloom* [v. *Metromedia*], 403 U.S. 29 [29 L.Ed.2d 296, 91 S.Ct. 1811]; and the Court so finds." Further, the court citing *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 [41 L.Ed.2d 789, 94 S.Ct. 2997], found that the individual plaintiffs "must be judged an inextricable part of the La Costa story, and thus public figures by the *Gertz* standard," apparently a reference to the "limited purpose public figure" doctrine set forth in *Gertz v. Robert Welch, Inc., supra,* 418 U.S. 323. However, it appears from the record before us that there was no "attorney order" prepared as directed within said memorandum opinion of November 19, 1975. Rather, it appears that the matter was reconsidered upon the court being advised of the case of *Time, Inc. v. Firestone* (1976) 424 U.S. 448 [47 L.Ed.2d 154, 96 S.Ct. 958], the opinion in which was rendered after the court's order of November 19, 1975. Accordingly, on April 5, 1976, Judge LeSage made his memorandum and notice of intended decision again making a careful and analytical review of the most significant and controlling cases, especially those of the Supreme Court of the United States. The court made its finding and order that the motions of defendants for summary judgment with respect to the plaintiffs Mo Dalitz and

Allard Roen were granted on the ground that the plaintiffs Dalitz and Roen were public figures and had failed to show malice. With respect to all other plaintiffs, the motions for summary judgment were denied. The court ruled that triable issues arose under the rule of the *Firestone* case.

In making its notice of intended ruling of April 5, 1976, the court stated that it had considered "in complete detail all the briefs, motions, pleadings, exhibits and evidence in this case." On June 25, 1976, the court declared that there were triable issues of fact with respect to whether or not all of the plaintiffs (except Mr. Dalitz and Mr. Roen) are public figures.

After the order of June 25, 1976, defendants petitioned the Court of Appeal for writ of mandate, which was denied. Hearing was denied by the California Supreme Court and certiorari denied by the United States Supreme Court. In July 1977, defendants again made a motion for summary judgment, this time expressly based upon the asserted privilege under Civil Code section 47(3). The defendants urged that this privilege was not ruled upon and formed no part of the basis of the trial court's earlier rulings of April 5, 1976, and its order of June 25, 1976, described earlier. A different judge, Foster, by whom this second motion was heard, concluded that the issue thus presented to him was a legal one, to wit, whether as a matter of law section 47(3) controlled. Judge Foster deemed it inappropriate to review the presumed determination of the prior judges on this issue. Accordingly, Judge Foster denied the defendants' motion.

About a year later on April 10, 1978, defendants filed another "motion for determination of issues without substantial controversy." The motion requested the same relief and was assigned to Judge Charles H. Phillips for hearing. After preliminary argument and an informal expression by

the judge that the question of whether plaintiffs are public figures had been decided earlier, the motion was withdrawn.

Thereafter, the matter was assigned to Judge Dell for all purposes including trial. The matter having thus been assigned, defendants renewed their motion for summary judgment that plaintiffs were public figures. In hearing the motion Judge Dell apparently considered the matter as requiring factual as well as legal determinations. As the trier of fact, it was not inappropriate for Judge Dell to have heard the renewed motion. It was in effect a request that certain issues be bifurcated and tried first.[2] These issues, if resolved favorably to defendants, would be dispositive of the case and eliminate the need for further lengthy trial on complex, factual questions. However, the determination, of course, required a trier of fact to hear and weigh the evidence relative to the question of whether or not plaintiffs' conduct made them public figures.

After hearing, the court on November 2, 1979, made the following ruling: "The Court denies the motion of Allard Roen for an order reviewing his dismissal as a plaintiff and restoring him as a plaintiff. The court's ruling is based upon both procedural and jurisdictional grounds and further upon the merits of the application.

"The Court grants the motions of defendants, Penthouse International, Ltd., Robert Guccione, Jeff Gerth and Lowell Bergman for an order adjudicating the following legal issues with respect to the Complaint in this action, as follows:

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[2]However, at the time defendants asserted the motion required resolution of only a *legal* issue. If this be so, it is hard to see how it could have been properly renewed except upon a claim of new *undisputed evidence* to support a different ruling. (See Code Civ. Proc., § 1008.)

"1. Section 47(3) of the California Civil Code affords a qualified privilege to media publications concerning matters of legitimate public interest.

"2. Defendants' publication of the Article entitled 'La Costa[']' concerns matters of legitimate public interest.

"3. Defendants' publication of said article is protected by a qualified privilege set forth in Section 47(3) of the California Civil Code.

"4. A corporation can be a public figure under the First Amendment to the United States Constitution.

"5. Plaintiff Rancho La Costa, Inc., has been a subject of legitimate public controversy.

"6. Plaintiff Rancho La Costa, Inc., is a public figure under the First Amendment to the United States Constitution.

"7. Plaintiff Merv Adelson, by virtue of his voluntary involvement as an officer, founder and defender of Rancho La Costa, Inc., is a public figure with respect to publications concerning the controversy surrounding La Costa.

"8. Plaintiff Irwin Molasky, by virtue of his voluntary involvement as an officer, founder and defender of Rancho La Costa, Inc., is a public figure with respect to publications concerning the controversy surrounding La Costa."

After the decision of November 2, 1979, plaintiffs (petitioners) applied to this court for writ of mandate directing the superior court to vacate its decision and order of November 2, 1979, and to enter an order denying the motion of defendants for partial summary judgment. We denied the previous petition[3] but directed the attention of the trial court to the California Supreme Court decision in *Vegod Corp. v. American Broadcasting Companies, Inc.* (1979) 25

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[3]*Rancho La Costa v. Superior Court*, 2d Civ. 57880.

Cal.3d 763 [160 Cal.Rptr. 97, 603 P.2d 14]. Petitioners thereupon applied to the superior court to reconsider its "public figure ruling." The superior court ruled on January 18, 1980, that it would not change its prior decision of November 2, 1979.

That portion of the order denying plaintiff Roen reinstatement is not before us in this petition for writ of mandate.

DISCUSSION:

For the reasons set forth below, we conclude that the trial court erred and we must grant a peremptory writ.

The issue before us is simply whether either the (1) "public figure" privilege under the federal Constitution, or (2) conditional privilege of Civil Code section 47(3) is available to defendants as a defense as a matter of law to the action for libel. Because our determination concerning the state statutory privilege (Civ. Code, § 47(3)) will be better understood in light of the discussion of the inapplicability of the constitutional privilege respecting public figures, we will discuss the constitutional privilege first.[4]

I.

THE PUBLIC FIGURE PRIVILEGE

In *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412], the United States Supreme Court expressed the rule that "public officials" may not prevail in an action for libel unless they can prove malice. That malice was described as present when the defendant publishes a statement with knowledge

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[4]We are mindful that generally where possible dispositive issues of statutory and local law should first be treated before reaching constitutional issues. (*Wolston v. Reader's Digest Assn. Inc.* (1979) 443 U.S. 157 [61 L.Ed.2d 450, 99 S.Ct. 2701].) But here we discuss both aspects.

that it is false or with reckless disregard of whether it is false or not. (*Id.* at pp. 279-280 [11 L.Ed.2d at pp. 706-707].) This obviously imposes a harsh burden upon plaintiffs. In the case of one suing a newspaper, a radio station, a television network or other disseminators of repeated information, it creates an exceptionally difficult burden to overcome. In the companion cases of *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130 [18 L.Ed.2d 1094, 87 S.Ct. 1975] and *Associated Press v. Walker* (1967) 388 U.S. 130 [18 L.Ed.2d 1094, 87 S.Ct. 1975], the court extended the rule of *New York Times Co. v. Sullivan, supra,* to apply to libel suits brought by "public figures." However, "public figure" was not then and there completely and totally defined for all times. Further definition and refinement developed through subsequent United States Supreme Court decisions. Thus in *Rosenbloom v. Metromedia* (1971) 403 U.S. 29 [29 L.Ed.2d 296, 91 S.Ct. 1811], the court affirmed a further extension of the *New York Times Co. v. Sullivan* privilege to a libel suit by a private individual against a licensed radio station for defamatory falsehood in a newscast relating to his "involvement in an event of *public or general concern.*" Under this test or definition the apparent facts of the present case would support the November 2, 1979, decision of the superior court. However, this definition from *Rosenbloom* was subsequently abandoned in favor of a stricter test of "public figure." We do not say nor do we imply that the trial judge was unaware or ignored the subsequent and relatively recent cases of *Time, Inc. v. Firestone, Gertz v. Robert Welch, Inc., Wolston v. Reader's Digest Assn., Inc.* or *Vegod Corp. v. American Broadcasting Companies, Inc.* To the contrary, the court appears to have been well informed and to have made a careful and thoughtful analysis. But we conclude that the evidence before the court does not support a decision that the plaintiffs

are public figures even for the "limited purpose" definition established in *Gertz v. Robert Welch, Inc.* Rather, the evidence would tend to support only a definition of "public figure" as expressed in *Rosenbloom v. Metromedia.*

The *Rosenbloom* extension of the *New York Times Co. v. Sullivan* privilege to defamation of private individuals "involved in" matters of "public or general concern" was expressly rejected and overruled by the Supreme Court in *Gertz v. Robert Welch, Inc., supra,* 418 U.S. 323. In *Gertz,* the court recognized two possible classifications of public figures, i.e. (1) the all-purpose public figure and (2) the limited-purpose public figure. As to the first type, the court explained that there might be in some instances certain persons who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." (*Id.* at p. 345 [41 L.Ed.2d at p. 808].) Quoting from *Curtis Publishing Co. v. Butts, supra,* the *Gertz* court indicated that such individuals are those who "by reason of their fame, shape events in areas of concern to society at large." " (*Gertz v. Robert Welch, Inc., supra,* 418 U.S. 323, 337 [41 L.Ed.2d 789, 803].) In this respect the court, however, cautioned: "[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." (*Id.* at p. 352 [41 L.Ed.2d at p. 812].) The second group, the limited-purpose public figures, was defined as those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." (*Id.* at p. 345 [41 L.Ed. 2d at p. 808].) Both groups ". . . invite attention and comment." (*Ibid.*) But, the court said, "No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an 'influential role in ordering society.' " (*Ibid.*)

It is significant that the *Gertz* court described other interests to be considered. It said: "We begin with the common ground. Under the First Amendment there is no such thing as a false idea . . . [b]ut there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. [Citation.] They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' [Citation.]" (418 U.S. pp. 339-340 [41 L.Ed.2d p. 805].)

The court further held: "The need to avoid self-censorship by the news media is . . . not the only societal value at issue. . . .

"The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.' [Citation.]" (418 U.S. at p. 341 [41 L.Ed.2d at p. 806].) More significantly, in California this right of privacy is not merely implied but is expressly set forth in article I, section 1 of the state Constitution.

In *Gertz*, the plaintiff, an attorney, by his own admission had an extensive record of public activity involving thousands of writings and public appearances and involvement in matters affected with public interest. There was evidence that he had written thousands of articles and reviews for countless publications. He had written for encyclopedias and other books and pamphlets and plays. He had written legal articles; he had written on politics, history, political science and journalism as well as many other fields. He had been interviewed during the course of 20 or 30 years by numerous radio and television stations in the State of Illinois and had made broadcasts on radio and television in many states across the nation. Most of the programs dealt with cases in which the plaintiff had been involved. He was a prominent attorney in Chicago, having represented clients who sometimes commanded a wide following in the press and media. And he had long been involved in civic affairs. In the libel action, defendant there asserted the public figure privilege. Yet notwithstanding the wide range of plaintiff's activity, his voluntary involvement in matters of public importance, and the scope of his activity,[5] the high court said that he was neither an all-purpose nor a limited-purpose public figure.

In *Time, Inc. v. Firestone, supra*, 424 U.S. 448, the court held that Mrs. Firestone, although a socialite of Palm Beach and the wife of a member of a famous family, was not and did not become a public figure, even though her divorce proceedings had become publicized and well known. Plaintiff herself caused some of the publicity by the

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[5]Although the recital of the facts in 418 U.S. 323 [41 L.Ed.2d 789, 94 S.Ct. 2997] does not contain all of the evidence which we recite, we are informed by counsel that the above described background of Gertz was the undisputed evidence from Gertz' own testimony and in the record before the United States Supreme Court.

calling of a series of press conferences. The 17-month trial attracted national attention and elicited 88 articles in the Miami and Palm Beach newspapers. Even so, the United States Supreme Court held that the relevant inquiry should be confined to whether a plaintiff is a public officer or a public figure who might be assumed to voluntarily expose himself to increased risk of injury from a defamatory falsehood. The court explained: "Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it." (*Id.* at pp. 453-454 [47 L.Ed.2d at pp. 162-163].)

In *Wolston v. Reader's Digest Assn., Inc.* (1979) 443 U.S. 157 [61 L.Ed.2d 450, 99 S.Ct. 2701], and its companion case, *Hutchinson v. Proxmire* (1979) 443 U.S. 111 [61 L.Ed.2d 411, 99 S.Ct. 2675], the definition of public figure was further narrowed. In *Wolston*, plaintiff, the nephew of convicted spies Myra and Jack Soble, had been the subject of "a major investigation into the activities of Soviet intelligence agents in the United States," (443 U.S. at p. 161 [61 L.Ed.2d at p. 456]) and had failed to respond to a grand jury subpoena resulting in an order to show cause why he should not be punished for contempt. In his libel action arising out of the Reader's Digest article about him, the court held that he was not a public figure. The court recognized that he had received extensive publicity at the time of the 1958 contempt citation, yet despite that publicity and the obvious importance of the issue of Soviet espionage the United States Supreme Court said that he was not a public figure either at the time of the publicity, or at the time of the publication, because he did not voluntarily

"engage the attention of the public in an attempt to influence the resolution of the issues involved."[6]

The language of the court defines the further limitations thus: "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. To accept such reasoning would in effect re-establish the doctrine advanced by the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971), which concluded that the *New York Times* standard should extend to defamatory falsehoods relating to private persons if the statements involved matters of public or general concern. We repudiated this proposition in *Gertz* and in *Firestone*, however, and we reject it again today." (*Wolston v. Reader's Digest Assn., Inc., supra,* 443 U.S. 157, 167 [61 L.Ed.2d 450, 460].)

The following language is also apposite: "It is difficult to determine with precision the 'public controversy' into which petitioner is alleged to have thrust himself. Certainly, there was no public controversy or debate in 1958 about the desirability of permitting Soviet espionage in the United States; all responsible United States citizens understandably were and are opposed to it. Respondents urge, and the Court of Appeals apparently agreed, that the public controversy involved the propriety of the actions of law enforcement officials in investigating and prosecuting suspected Soviet

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[6]Even if one of petitioners here might be proven to have been a public figure or a limited public figure by reason of some involvement with or association with one convicted of a criminal offense, passage of time may well erase that status and reduce such a plaintiff to the status of private individual. (*Wolston v. Reader's Digest Assn., Inc.* (1979) 443 U.S. 157, 166, fn. 7 [61 L.Ed.2d 450, 459, 99 S.Ct. 2701]; see concurring opinion Blackmun, p. 169 [61 L.Ed.2d p. 461] and note at p. 170 [61 L.Ed.2d at p. 462].) As in *Wolston*, we need not rely upon this passage-of-time argument. The evidence at bench is insufficient to establish plaintiffs as public figures for the purpose of any privilege.

agents. . . . We may accept, *arguendo*, respondents' characterization of the 'public controversy' involved in this case, for it is clear that petitioner fails to meet the other criteria established in *Gertz* for public-figure status." (*Id.* at p. 166, fn. 8 [61 L.Ed.2d at p. 459].)

At bench there is no public controversy or debate over the "desirability" of "organized crime." There truly never has been. All conscientious and responsible citizens are opposed to it. There was no "controversy" over La Costa itself. At most it was a matter of limited press interest. The creation of a large resort-spa and attendant facilities created no "public controversy." But, even if La Costa were deemed *arguendo* a matter of public controversy, that fact alone would not and does not make petitioners public figures. In *Hutchinson v. Proxmire, supra,* 443 U.S. 111, the court similarly held that plaintiff there, a prominent scientist and administrator who had broad "access to the media," was likewise not a public figure because: "Hutchinson did not thrust himself or his views into public controversy to influence others. Respondents have not identified such a particular controversy; at most, they point to concern about general public expenditures." (*Id.* at p. 135 [61 L.Ed.2d at p. 431].)

California has recently recognized the limits placed upon defamatory speech by the United States Supreme Court cases discussed above. In *Franklin v. Benevolent etc. Order of Elks* (1979) 97 Cal.App.3d 915 [159 Cal.Rptr. 131], defendant Elks association was sued by plaintiff school teacher. She had selected parts of a book which was a "pastiche of underground writings concerning revolution, sex and drugs, vividly illustrated and replete with vulgar language," (*id.* at p. 919) for use in her high school classroom. The defendant organization wrote and published an editorial in its own magazine strongly criticizing the book

and its use as instructional material. The editorial reported that the teacher had been dismissed from another school system and opined that she was not the sort of teacher that anyone wanted teaching in our school system. In the defense of the ensuing libel action, the defendants moved for summary judgment based on the contention that the teacher could not establish as an essential element of her case i.e., that the alleged libels were published with actual malice; that she as a public official and public figure was required to establish such malice. The court summarily rejected the assertion that a school teacher was a public official. As to the question of whether the teacher had been a public figure, the court said: "In our view the definition of 'public figure' which has evolved from *Butts* through *Gertz, Firestone* and *Wolston* incorporates as an element a requirement that the libel plaintiff must have voluntarily and actively sought, in connection with any given matter of public interest,to *influence* the resolution of the issues involved. To us it seems clear that only by such voluntary and active participation could an individual be said to have 'relinquished . . . his interest in the protection of his own name.' " (*Id.* at p. 929; italics in original.) Thus the teacher was held not to be a public figure.

The recent case of *Weingarten v. Block* (1980) 102 Cal.App.3d 129 [162 Cal.Rptr. 701], affords a comparison of one who is truly a public official or public figure and who has thrown himself into the vortex of the particular controversy. The court there correctly recognized that the attorney for a city or for a public district is a *public* figure. But, moreover, the court explained that the employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy. The court there noted the activities of the

plaintiff which were set forth in the findings of the court. He was active as a lawyer, an officer of a political party, a candidate for the state legislature, the leader of a recall movement, and a prolific real estate dealer. He had voluntarily appeared and spoken openly concerning matters of city and public affairs which related to and affected his property dealings. He had not only been city attorney but was also attorney for the redevelopment agency. As such, plaintiff had substantial control over the conduct of governmental affairs of the city. After his discharge as city attorney and the recall of some of the city council's members who had discharged him, the public had an independent interest in anything that might touch on his fitness for that office and for his continued services to the redevelopment agency.

Considering next the corporate or public nature of some of the plaintiffs, that fact affords defendants no greater privilege of defamation. (*Vegod Corp. v. American Broadcasting Companies, Inc., supra,* 25 Cal.3d 763.) The court there said that for the purposes of applying the First Amendment privilege to defamation claims, there is no difference between corporations and individuals. Corporations may equally be public figures but are equally entitled to the same protections as private individuals with reference to the public-figure aspect and the issue of malice. Recognizing and relying primarily upon the persuasions and holdings of *Firestone* and *Gertz,* our Supreme Court said in *Vegod:* "Defendants argue that the demise and closing out sale of the City of Paris were matters of public controversy because it was a 'landmark store.' Even assuming the venerable store's planned destruction created a public controversy, those conducting the subsequent close-out sale cannot be said to have thrown themselves into the vortex of that controversy. It does not appear that plaintiffs urged City of

Paris publicly or otherwise to terminate business or to destroy the 'landmark.' Merely doing business with parties to a public controversy does not elevate one to public figure status.

"Defendants also urge that by selling goods to the public and by advertising the sale plaintiffs became public figures. In *Gertz* the court in concluding that he was not a public figure pointed out that Mr. Gertz had never discussed the civil or criminal litigation with the press. In *Firestone* the court pointed out that Mrs. Firestone did not seek publicity on the propriety of her marital conduct.

"While availability of goods for sale and their quality are matters of public interest, this is not the test. The public interest test was expressly rejected in *Gertz* (418 U.S. at p. 346 [41 L.Ed.2d at p. 809]), and in *Firestone* (424 U.S. at pp. 455-456 [47 L.Ed.2d at pp. 163-164]), in favor of the public controversy test. (See also *Hutchinson v. Proxmire* (1979) 443 U.S. 111 [61 L.Ed.2d 411, 99 S.Ct. 2675].)

"Criticism of commercial conduct does not deserve the special protection of the actual malice test. Balancing one individual's limited First Amendment interest against another's reputation interest (*Herbert v. Lando* (1979) 441 U.S. 153, 169, [60 L.Ed.2d 115, 129, 99 S.Ct. 1635]), we conclude that a person in the business world advertising his wares does not necessarily become part of an existing public controversy. It follows those assuming the role of business practice critic do not acquire the First Amendment privilege to denigrate such entrepreneur." [Fn. omitted.] (*Vegod Corp. v. American Broadcasting Companies, Inc., supra,* 25 Cal.3d 763, 769-770.)

It is apparent from *Vegod* that merely because a corporation sells services to the public as does La Costa, and

merely because it employs and has access to the media to advertise its services (as *Vegod* had the access to advertise its wares) does not mean that such ability gives the corporation the status of one with greater power of persuasion on public issues, controversial or not, or all-pervasive influence. Thus it is apparent that neither the "public interest" test rejected in *Gertz* nor the voluntarily-thrusting-into-public-controversy test present in *Weingarten v. Block* applies simply because of the availability of advertising.

We note that defendants both in their oral presentation and in their briefs stressed the fact that La Costa had access "to the media" for a great and costly advertising campaign. The holding of *Vegod* sufficiently answers that advertising is not thrusting oneself into the vortex of a controversy. Similarly the "great access" to "the media"—also urged by defendants as significant—is not the same thing as having or seeking to have persuasive or pervasive influence on the *outcome* of controversial issues.

Assessing the status of petitioners at bench in the light of the above cases from the United States Supreme Court, and especially comparing the protected "private individual" status accorded the several plaintiffs in *Gertz, Firestone, Wolston* and *Hutchinson* and further considering the tremendous amount of prelibel publicity given to those respective individuals, it appears to us from the record that the evidence presented to the trial court concerning the petitioners here falls far short of the quality and quantity required. The record fails to demonstrate that level of clarity and substance of evidence required to prove and establish the petitioners as public figures.

II

The Inadequacy of Shoe Box Evidence

In proving that the plaintiff in a libel action is a public figure, it is not enough simply to present evidence of much publicity. The quantity of such evidence might be a shoe

boxful or a trunkful of newspaper and magazine clippings. Admittedly, in this case the amount of evidence presented to the trial court in support of the motion was extremely voluminous. Not all of it was physically present before Judge Dell when he heard and considered the motion. It originally consisted of several boxes of books, magazines, newspaper clippings, reports, and later had added to it exhibits to depositions. A large amount was presented to Judge LeSage in 1975. Some of it was lost. There may have been copies of the lost material. Copies of the lost material together with other documents were summarized by Jewel Bjork, cocounsel for defendants. She presented to Judge Dell an affidavit summarizing the nature of the hundreds of documents and papers constituting the exhibits. We have no question concerning the truthfulness of Ms. Bjork's affidavit nor the truthful description of the contents of the original documents. In her affidavit Ms. Bjork classifies the mass of documentary evidence gathered and separated into seven files as exhibits. She explains that the several exhibits deal with the following topics: "(a) media access by the plaintiffs (Exhibit 1);

"(b) plaintiffs' general fame or notoriety in the community (Exhibit 2);

"(c) plaintiffs' purposeful involvement in the vortex of the La Costa story (Exhibit 3);

"(d) the genesis and history of the controversy about La Costa (Exhibit 4);

"(e) the continuing public interest in the controversy and the plaintiffs (Exhibit 5);

"(f) the public figure status of Dalitz and Roen, as shown earlier in this action via the Gelb affidavits of 1975 (Exhibit 6);

"(g) the identification of Dalitz and Molasky as figures involved with organized crime by the Attorney General of the State of California (Exhibit 7); and

"(h) the intense public interest and concern with crime, Teamsters Pension Fund loans, corrupt business and politics (Exhibit 8)."

We have not personally examined this mass of documentary evidence. However, giving full credence to Ms. Bjork's statement as to what the seven groups contain, it is clear to us that the evidence is legally insufficient. Ms. Bjork's characterization of much of the material as more fully described in her affidavit is conclusionary; on the specific question of the status or character of the plaintiffs, as "mobsters", "gangsters", "crooks" and "associates" of crooks and mobsters, etc. the "evidentiary" material is "99 and 44/100's%" pure hearsay and itself conclusionary. Most of the purported evidence is third and fourth-hand hearsay. Most of the documents discussed in Ms. Bjork's affidavit refer to other documents or sources of hearsay such as prior "reports" by newspapers, magazines, television "documentaries" and the like. There is no showing that there was presented to the trial court either at the 1975, 1977 or 1978 hearings or to Judge Dell at the 1979 hearing, any *primary* source of information relative to the specific conduct of any particular plaintiff eye-witnessed by a percipient witness and upon which defendants can pin the tag of public figure on such plaintiff. There is no primary non-hearsay evidence of criminality of the remaining corporate or individual plaintiffs. Even accepting that Dalitz, not a party to this petition, was a convicted criminal, mere association or working with others accused or convicted of crime is not enough under *Gertz* and *Wolston, supra.*

Even if the material is a mountain of clippings, it is no better than that in *Franklin v. Benevolent etc. Order of Elks,*

supra, 97 Cal.App.3d 915, 930, where the court said: "Respondents tendered in support of their motion for summary judgment, in addition to materials plainly directed to the actual-malice issue, a voluminous collection of clippings from newspapers and from a newsmagazine, relating both to the San Rafael textbook controversy and to an episode several years earlier, in Paradise, California, in which appellant had experienced a similar confrontation over her teaching methods with the local American Legion post. It is elementary that affidavits in support of a motion for summary judgment shall contain, and may be considered only to the extent that they contain, admissible evidence (Code Civ. Proc., § 437c; 4 Witkin, Cal. Procedure (2d ed. 1971) Proceedings Without Trial, §§ 180-187, pp. 2832-2837). It is clear that, by virtue of the hearsay rule (Evid. Code, § 1200 et seq.), respondents' collection of clippings was not admissible evidence of the facts stated therein, but could be competent evidence only of the fact that appellant had received a considerable amount of publicity." Similarly, we here reject the proposition that public figure status can be established by evidence of much publicity which, in turn, is primarily or basically a voluminous amount of newspaper and magazine articles, the "shoe-boxful" method of proof.

That the plaintiffs' commercial enterprises, La Costa Resorts and the other corporate activities, advertised their services for purposes of promoting business nationwide, does not add to or change the "shoe box" evidence here. (*Vegod Corp. v. American Broadcasting Companies, Inc.*, *supra*, 25 Cal.3d 763.) Moreover, absent the requisite elements of public figure status, as we have discussed them above, no amount of publicity can involuntarily convert the purely private individual into a public figure. Lacking at bench is direct evidence of facts showing that plaintiffs intentionally and voluntarily sought publicity or entered into

a particular controversy to affect its outcome. Defendants have a mountain of material. But they do not point to any items of evidence showing (1) what particular controversy existed, (2) the particular acts as to how, where and when plaintiffs entered therein, (3) that plaintiffs did so intentionally, and (4) that they intended to affect its outcome. In sum, there is an absence of firsthand evidence of plaintiffs' *conduct* making them public figures. We do not accept defendant's contention that publicity per se—light or heavy—creates a public figure. It is clear to this court that it has not been established as a matter of law at this stage of the proceedings that plaintiffs are public figures. There is here no agreement as to the ruling on the motion by the trial court.[7]

III.

THE PRIVILEGE UNDER CIVIL CODE SECTION 47(3)

Apart from the claim of privilege concerning public figures which we have discussed above, defendants claim that their publication was privileged under Civil Code section 47(3). We reject the contention. The state conditional privilege of section 47(3) does not apply to a publication by a

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[7]The precise nature of the motion before the trial court and thus the exact extent of the task imposed upon the trial judge is somewhat uncertain. Defendants assert in their briefs and exhibits before us that the motion before Judge Dell was not a motion *in limine* involving a determination of factual questions. If not, what was it? Defendants assert that the motion was solely for the determination of specific *legal* issues. As indicated earlier, we have some difficulty in recognizing this as proper under Code of Civil Procedure section 1008. Whatever the procedural posture, whether the motion was a traditional motion for summary judgment or simply for adjudication of a bifurcated issue, our discussion demonstrates that because of the existence of factual questions yet to be determined, this procedure for a form of summary adjudication of part of the case, while perhaps not totally inappropriate, is of questionable value in a case such as this, where the operative facts are neither all established nor agreed to. (*Hutchinson v. Proxmire* (1979) 443 U.S. 111, 120, fn. 9 [61 L.Ed.2d 411, 422, 99 S.Ct. 2675].)

magazine or newspaper merely because it relates to a matter which may have general public interest. (*Newby v. Times-Mirror Co.* (1920) 46 Cal.App.110 [188 P. 1008]; *Gilman v. McClatchy* (1896) 111 Cal. 606 [44 P. 241].)

Civil Code section 47(3) extends a general privilege to a communication made "without malice to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information."

The word "interested" as used in the statute refers to a more direct and immediate concern. That concern is something other than mere general or idle curiosity of the general readership of newspapers and magazines. One authority explains the statutory interest as follows: (1) The "interest" applies to a defendant who "is protecting his own pecuniary or proprietary interest." (2) The required "relation" between the parties to the communication is a contractual, business or similar relationship, such as "between partners, corporate officers and members of incorporated associations," or between "union members [and] union officers." (3) The "request" referred to must have been in the course of a business or professional relationship. (4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, §§ 306-309, pp. 2577-2580.)

While this definition may not be exclusive, it is clear that the case at bench does not qualify for application of the conditional privilege. The strictly limited statutory qualified privilege is inapplicable to a defamatory article published at large to a vast audience in a national magazine.

In *Gilman v. McClatchy, supra,* 111 Cal. 606, where the Supreme Court of California unequivocally denied the

applicability of the section 47(3) privilege to a false newspaper report that the plaintiff had committed a crime, the court said: "In this case appellant asks for such an extension of the law as would give immunity to publishers of libels, provided express malice in the publication be absent. In other words, his contention resolves itself to this, that a newspaper is a purveyor of news; the people have the right to read the news; any story gleaned by a reporter as this was gleaned, and published in the ordinary course of newspaper business without personal malevolence against the victim of the tale, should be held privileged. [¶] In support of this contention there is neither authority, law, nor justice." (*Id.* at pp. 613-614.)

In *Gilman*, the court recognized a privilege under section 47(3) to comment fairly on the conduct of "public officials" but it refused (much like the Supreme Court in *Gertz v. Welch*) to extend the qualified privilege to all matters of "public interest," on the ground that such an extension "would . . . put upon the people a greater evil than that which the constitution sought to prevent." The court concurred with the case of *McAllister v. Detroit Free Press Co.* (1889) 76 Mich. 338 [43 N.W. 431, 15 Am. St. Rep. 318], quoting the language therein, as follows: " 'No newspaper has any right to trifle with the reputation of any citizen, or by carelessness or recklessness to injure his good name and fame, or business. . . . And no sophistry of reasoning, and no excuse of the demand of the public for news, or of the peculiarity and magnitude of newspaper work, can avail to alter the law, except, perhaps, by positive statute, which is doubtful, so as to leave a party thus injured without any recompense for a wrong which can even now, as the law stands, never be adequately compensated to one who loves his reputation better than money.' " (*Id.* at p. 615.)

That principle has been reaffirmed in more recent cases, e.g., *Peoples v. Tautfest* (1969) 274 Cal.App.2d 630, 636-637 [79 Cal.Rptr. 478], where the court held: "We conclude that the privilege provided in subdivision 3 of Section 47 is not applicable to the case at bench. . . . The accusations were made to persons sought out by appellants and were unsolicited. They did not relate directly to the conduct of a public officer or employee or of a candidate for public office. [Citations.]"

So too, in *Newby v. Times-Mirror Co., supra,* 46 Cal.App. 110, where an attorney sued a newspaper for libel, and the newspaper alleged a privilege under section 47(3) of the Civil Code, the court held that an article is not privileged "simply because it relates to a subject of public interest." To the same effect, see *Newby v. Times-Mirror Co.* (1916) 173 Cal. 387 [160 P. 233]; *Edwards v. Publishing Soc.* (1893) 99 Cal. 431 [34 P. 128]. In *Edwards* it was emphatically held that: "A newspaper proprietor is not privileged as such in the dissemination of the news, but is liable for what he publishes in the same manner as any other individual." (*McAllister v. Detroit Free Press Co.*, 76 Mich. 338; 15 Am. St. Rep. 318)." (*Id.* at p. 439.)

In *Earl v. Times-Mirror Co.* (1921) 185 Cal. 165 [196 P. 57], the defendants again invoked section 47. The Supreme Court rejected the claimed application of the conditional privilege saying: "That the publication of a newspaper by the plaintiff, as a matter of law affects either the liability of the defendants to respond in damages, or the right of the plaintiff to recover for a publication which would be considered libelous as to any other person, is a proposition that cannot be successfully maintained. The decision in the case of *Newby v. Times-Mirror Co.*, 173 Cal. 387, [Ann. Cas. 1917E, 186, 160 Pac. 233], supports this conclusion." (*Id.* at p. 197.)

The authorities cited by defendants in the memoranda to the trial court and before us as part of the exhibits are distinguishable. A number of those cases which applied the section 47(3) privilege to defamatory comments related to public officials. (E.g., *Snively v. Record Publishing Co.* (1921) 185 Cal. 565 [198 P. 1]; *Harris v. Curtis Publishing Co.* (1942) 49 Cal.App.2d 340 [121 P.2d 761]; *Everett v. California Teachers Assn.* (1962) 208 Cal.App.2d 291 [25 Cal.Rptr. 120].) In other cases, the publication was limited to a local or a special interest group and related to matters of special concern. (*Maidman v. Jewish Publications, Inc.* (1960) 54 Cal.2d 643 [7 Cal.Rptr. 617, 355 P.2d 265, 87 A.L.R.2d 439]; *Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791 [197 P.2d 713]; *Toney v. State of California* (1976) 54 Cal.App.3d 779 [126 Cal.Rptr. 869]; *Williams v. Daily Review, Inc.* (1965) 236 Cal.App.2d 405 [46 Cal.Rptr. 135]; *Glenn v. Gibson* (1946) 75 Cal.App.2d 649 [171 P.2d 118]; *Heuer v. Kee* (1936) 15 Cal.App.2d 710 [59 P.2d 1063].)

Plaintiffs as private individuals are entitled to the protection of their right of privacy. That right is entitled to redress when violated. Under the mandate of the recent federal Supreme Court rulings, the right of privacy is paramount to the right of free speech when in the exercise of free speech a defendant violates another's privacy by uttering a defamatory lie about him. The right of free speech guaranteed by the state and federal Constitutions does not permit violation of the right of privacy. It most surely follows that the privilege created by Civil Code section 47(3), a statute, and thus a law of lesser organic force, cannot be expanded to permit violation of that same right of privacy. Whatever privilege is accorded defendants under Civil Code section 47(3), it must yield to the plaintiffs' constitutional rights of privacy.

We need not extend the discussion of the inapplicability of section 47(3) relative to the subject matter of the publication at bench, and who was interested therein, who was entitled to receive and who was entitled to disseminate it. Such discussion is made unnecessary because the only basis upon which defendants seek the benefit of the statute is by saying that the public at large, and hence that part thereof which constitutes its readership, is interested generally in the fight against organized crime. There being no specific evidence of any particular or specific subject matter of communication, no recital of the inadequacy of the evidence on the application of the section is necessary.

Defendants contend that the application of section 47(3) is solely a matter of law, and its application is apparent from the plaintiffs' own complaint. We have accepted defendants' premise in this present discussion relative to Civil Code section 47(3). The complaint discloses that the plaintiffs organized corporations and are officers and directors thereof. The corporations operate hotels, resorts, spas and attendant services. These services are offered to the public. Defendants publish a magazine with a circulation in excess of five million. The defamatory article appeared in defendants' magazine. This is no more than the claim of carte blanche application of the privilege of section 47(3) to any newspaper or magazine of national or general readership, a proposition which, we explained above, is not the law.

In summary, we conclude that there remain factual questions to be tried. Either party is entitled to a trial by jury on these issues of fact, if a jury has been properly requested. The trial court can prepare instructions to the jury as to what facts it must determine are present and which are necessary to constitute libel, and what facts make a person a public figure and what is malice. The plaintiffs are entitled to recover if they can prove (1) the publication of a libelous

statement, and (2) damages arising therefrom. Defendants are still entitled to prove if they can the *fact* that plaintiffs are public figures. They have the burden of proof thereon. They may seek to prove such fact by the introduction of competent evidence on that issue. That evidence may include evidence that by their voluntary conduct, plaintiffs intentionally or unwittingly removed themselves from the status of private persons, or willingly exposed themselves and relinquished their rights of privacy. If the defendants so prove that plaintiffs are public figures, then plaintiffs in order to recover must, in addition to proving the publication of a libelous statement, prove that the publication was made with malice as that term is defined under California law and the damages therefrom.

It is ordered that a writ issue directing the Superior Court to vacate its order of November 2, 1979, and to make and enter a new and different order consistent with the opinions expressed herein.

Roth, P. J., and Fleming, J., concurred.

APPENDIX C.

Order of Court of Appeal Denying Petition for Rehearing.

Los Angeles, Cal.
June 26, 1980

RANCHO LA COSTA, INC., *et al.*,

vs.

SUPERIOR COURT, LOS ANGELES COUNTY.

No. 58487

THE COURT: Petition for rehearing denied.

Clay Robbins, Clerk

APPENDIX D.

Order Denying Hearing
After Judgment by the Court of Appeal.

2d District, Division 2,
Civil No. 58487

In the Supreme Court
of the State of California
in Bank
August 28, 1980

RANCHO LA COSTA, INCORPORATED, etc., *et al.*,
Petitioners,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

PENTHOUSE INTERNATIONAL, LIMITED *et al.*,
Real Parties in Interest.

Real Parties In Interest's petition for hearing DENIED.

Tobriner, J., is of the opinion the petition should be granted.

BIRD
Chief Justice

APPENDIX E.

In the Court of Appeal of the State of California
Second Appellate District
Division Two

2nd Civil 58487
L.A. Sup. Ct. No. C 124 901
(George M. Dell, Judge)

RANCHO LA COSTA, INC., a Nevada corporation; LA COSTA LAND COMPANY, an Illinois corporation; LA COSTA LAND COMPANY, a California corporation; LA COSTA COMMUNITY ANTENNA SYSTEM, INC., a California corporation; PARADISE HOMES, INC., a California Corporation; MERV ADELSON and IRWIN MOLASKY,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent ;

PENTHOUSE INTERNATIONAL, LTD., a corporation; ROBERT GUCCIONE; LOWELL BERGMAN and JEFF GERTH,

Real Parties in Interest.

Notice of Appeal to the Supreme Court of the United States.

NOTICE IS HEREBY GIVEN that Penthouse International, Ltd., Robert Guccione, Lowell Bergman and Jeff Gerth, real parties in interest above-named, hereby appeal to the Supreme Court of the United States from the judgment of the Court of Appeal of the State of California, Second Appellate District, entered in this action on June 6, 1980 and as to which judgment the California Supreme Court denied a hearing on August 28, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED: October 1, 1980.

PAUL, HASTINGS, JANOFSKY
& WALKER
GRUTMAN & SCHAFRANN
By Carl W. Shapiro

Attorneys for Real Parties in Interest.

DECLARATION OF SERVICE.

I, Kathleen Panas, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 555 South Flower Street, Twenty-Second Floor, Los Angeles, California 90071.

On October 1, 1980, I served the foregoing document described as NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on all the parties required to be served by depositing a copy of said document in a United States mailbox, with first-class postage prepaid, addressed to the counsel of record of the parties as follows:

Michael J. Silverberg, Esq.
PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
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Attorneys for: Rancho La Costa, Inc.
La Costa Land Company
La Costa Management Company
La Costa Community Antenna System, Inc.
Paradise Homes, Inc.
Merv Adelson
Irwin Molasky

Executed on October 1, 1980 at Los Angeles, California. I declare under penalty of perjury that the foregoing is true and correct.

Kathleen Panas

APPENDIX F.

Examples of Public Comment Concerning The La Costa Controversy.

Ed Reid and Ovid Demaris, The Green Felt Jungle (Trident Press) (1963)

"Before detailing some of these intricate financial manipulations, a little background information is necessary to show the relationship between James Riddle Hoffa and Morris B. 'Moe' Dalitz. Their association can be dated back to 1949 [as documented in] Attorney General Robert F. Kennedy's book, *The Enemy Within* . . . .

"This was the background that paved the way for Moe Dalitz to receive multimillion-dollar loans from the Teamsters Pension Fund ten years later.

"The first loan involved Sunrise Hospital, a Dalitz-controlled copartnership which included Nathan Adelson, his son Merv Adelson, Irwin Molasky, Allard Roen, and Eli Boyer. Merv Adelson and Molasky are known in Las Vegas as 'guys who fell into it' when they became socially acquainted with Dalitz at the Desert Inn Country Club. They were young and aggressive and 'clean' — no police record. Before Dalitz adopted them, they owned the Colonial House on the Strip, a bistro noted as a haven for prostitutes in those days. But the moment Dalitz smiled upon them, they sold the Colonial House and fell into step behind Dalitz. They learned much and prospered enormously. Today they are both millionaires."

Los Angeles Times, March 21, 1965

"Millions of dollars in new loans from a Chicago-based Teamsters Union pension fund have poured into Southern California, including $4 million to a group studded with Las Vegas gambling casino owners.

"Some operators of the Desert Inn and Stardust Hotel casinos on the Las Vegas strip are investors with the Teamsters fund in La Costa, a contemplated $300 million residential and recreational community in Northern San Diego County. . . .

"Names of Morris B. (Moe) Dalitz and Allard Roen of the Desert Inn and Stardust, whose involvement in other Teamsters pension fund loans in Las Vegas was revealed by The Times three years ago, have turned up in connection with the La Costa project. . . .

"The loan to the Las Vegas group for the La Costa project was made Nov. 19. Signing trust deeds on behalf of four corporations were Merv Adelson, president, and Berne Rolston, assistant secretary. . . .

"Dalitz and Roen still retain their shares in the Desert Inn and Stardust, although Dalitz is less active than previously. Roen is secretary-treasurer and executive officer of the Desert Inn. . . .

"According to testimony before the Kefauver Senate crime investigating committee, Dalitz was a prohibition era rum-runner and later a Cleveland gambling kingpin with crime syndicate connections.

"Roen, general manager of the Desert Inn and Stardust for more than a dozen years, pleaded guilty in early 1962 to stock fraud in the New York federal court case involving United Dye & Chemical Corp.

"Mervyn Adelson and Molasky, the vice president of Planet, Inc. [the predecessor to La Costa], formerly held restricted gambling licenses in Nevada and were co-owners of the Colonial House in Las Vegas.

"More recently they have turned to real estate development with the aid of investments from Dalitz, Roen, Rothkopf and others — and millions from the Teamsters' Central States, Southeast and Southwest Areas Pension Fund."

San Diego Union, June 24, 1965

"The bright young men of Las Vegas who are developing La Costa . . . made a public appearance today.

"The million-dollar clubhouse at the country club there still lacks $225,000 worth of furniture, but the time had come for MERV ADELSON, IRWIN MOLASKY, HARRY LAHR and IRV ROSTON to show public officials what they're up to. . . .

"The ADELSON group was the biggest subdivider in Nevada. Project manager ROSTON said it chose to develop the 2,700 acres between El Camino Real and Rancho Santa Fe Road because of north San Diego county's projected growth. . . .

"ADELSON, in his late 30s, handsome, personable and fashionably tailored, had only a few words to say through a microphone.

" 'Since we come from Las Vegas,' he said lightly, 'I have heard rumors we plan to fill the clubhouse with dice and card tables, but this is not the case.

" 'We are here to stay and you will find that we will cooperate with you in every way.' "

Oakland Tribune, September 23, 1969

"Seemingly remote from the death throes of the Beverly Ridge Estates project, with its huge Teamster Central States Pension Fund loan, the World of La Costa lies in splendor 90 miles southward, on the rolling terrain of San Diego County, two miles from the blue Pacific.

"With its whirlpool baths, golf, riding, tennis, homesites, restaurant and meeting facilities, La Costa apparently moves toward its destiny as a haven of serenity for international wheeler-dealers and other friends of the Central States Pension Fund. . . .

"This 3,000-acre, modern-day Xanadu, a scant 30 miles from President Nixon's Summer White House at San Clemente, gets fascinated scrutiny by law enforcement officials.

"Investigators cannot conceal their interest in La Costa, which, with more development to come, is financed thus far with $18.8 million in loans from the same Chicago-based Teamster Pension fund where Beverly Ridge got its money.

"La Costa's original developers include Allard Roen, who was convicted in 1962 on stock fraud charges, and Morris Barney "Moe" Dalitz, who, with Roen, was part of the old-time Cleveland gambling crowd. Later they were owners of the Desert Inn hotel and casino in Las Vegas.

"Before coming to California, they sold the Desert Inn to Howard Hughes. Other developers in the early stages of La Costa were Mervyn Adelson and Irwin Molasky, associated with Roen and Dalitz in the Las Vegas Sunrise Hospital enterprises which also were backed by loans from the Chicago-based pension fund.

"One high-ranking state agent flatly says La Costa attracts organized crime figures from the western half of the United States. He paints a verbal picture of the weary mobster, like any legitimate businessman, stepping off a jetliner at nearby San Diego, briefcase in hand, all set to talk a little business amid La Costa's sun and fun.

"The writer of La Costa's promotional literature (which is distributed so widely that several upper level state and federal investigators are on the mailing list) seemingly is awe-stricken with his task.

" 'It is evident . . . that La Costa's time has come,' promises the promoter. He says that the 'mighty metropolis' of Los Angeles and the 'awakening giant' of San Diego

accommodate the 'relentless stream' of westward-moving Americans.

"Whether or not the mighty paths of progress are converging on La Costa, it is evident that long-time Central States Teamster Fund cronies and gamblers are. . . .

"While La Costa is thrown open to the affluent of the world, federal agents doubt that the 'straight' types whose kids join the two saddle clubs or plunge in the four pools or even the portly elders who attend sales conferences there, will be invited to take part in some of the more cloistered activities.

"There are recurring reports of private high stake card and dice games and other forms of big-time gambling on the secluded premises, a federal agent said.

"The mere presence of operators Allard Roen, Moe Dalitz and their old-time buddy in Las Vegas, 'Icepick Willie' Alderman is enough to pique federal interest, he said.

"Another interested official pointed out in Washington recently that the reason the Las Vegas boys can operate in Southern California is because organized crime has staked out no formal boundaries there.

" 'A guy like Moe Dalitz can move around there,' he said. 'In New England he'd get killed if he tried to move in.'

"It may not be, as the promoter sings, that the 'resort-residential attractions of La Costa are the most monumental ever beheld by the eyes of man.'

"But it does seem that the developers of this paradise-on-earth, like many another wise and lucky recipient of a Teamster Fund loan, may as La Costa's promoter puts it, 'taste the sweet rewards of their early foresight.' . . ."

San Diego Evening Tribune, January 1, 1971

" 'Jimmy Hoffa is a very fine gentleman and I still consider him as such.

" 'Jimmy doesn't drink, smoke or chase around after women. Personally, although it doesn't mean anything, I think Jimmy was framed.'

"James Riddle Hoffa is the imprisoned Teamsters Union boss.

"The man talking about him was Allard Roen, one of four businessmen who now own the North Coast resort of La Costa.

"La Costa, 35 miles north of San Diego, is a plush resort which specializes in offering the affluent relaxation and privacy while playing golf, tennis or losing weight at its spa.

"Roen, in a four-hour interview, discussed La Costa's development since 1964 and how Teamsters money — $20 million so far by his estimates — helped push it along.

" 'People think Teamsters money is bad because it is associated by some with gangsters,' Roen said. 'That is not true. They have access to huge sums of money. It's only logical for them to invest. They have to make money for their members, too.'

"Roen was referring to testimony presented before the U.S. Senate Select Committee on Improper Activities in the Labor or Management Fields . . . .

"It [the Committee] warned that certain associations by Teamsters leaders put them in the hands of gangsters . . . .

"Roen and his associates — Merv Adelson, Irwin Molasky and Morris (Mo) Dalitz — continue to develop La

Costa with the help of millions in Teamsters pension fund loans.

" 'Why not?' they ask. The association has been successful in the past. By their own estimate, they borrowed millions of dollars from Teamsters pension funds for two gambling casinos, a hospital, housing developments, country clubs, and an office building in Las Vegas in the 1960s.

"Roen offered two reasons for success in getting the original loans for the Las Vegas projects: the merits of the master planning involved in the projects and the friendship of Jimmy Hoffa.

" 'The fact that we knew Jimmy — and he knew us — helped a lot,' he said.

" 'We proved to be a good risk and never defaulted on our payments. We went to the Teamsters board of directors (of the Central States, Southeast and Southwest Pension Funds) because they had the kind of money we needed for our investments.' . . .

"To protect their investment, the pension fund trustees have taken collateral in the form of trust deeds, assignment of rents and other complicated financial arrangements 'for tax shelter purposes' at La Costa, Roen said.

"Also, three trustees of the Central States fund of the Teamsters Union became members of the board of directors of Rancho La Costa, Inc., Roen said, along with him, Dalitz, Molasky and Adelson."

San Diego Evening Tribune, December 31, 1970

" 'Everything we have here is first class,' Roen said, 'and we are proud of it.' . . .

"The way Roen puts it, all the business acumen he and his three associates learned in Las Vegas is being applied at La Costa.

"The four are Merv Adelson, Irwin Molasky, Roen and Dalitz. . . .

"Roen said in the interview, 'we made our money in Las Vegas. If people want to put a bad connotation on that — that Las Vegas money is bad — well, then it is bad.' "

Chicago Tribune, April 23, 1971

"In this artfully designed setting of condominiums and private homes, a CHICAGO TRIBUNE investigation has disclosed the largest mobster connection with professional golf since Chicago's Tam O'Shanter tournaments in the 1940s and '50s.

"The scene, less than 25 miles from the California White House, is La Costa Country Club, where the Professional Golfers Association's vaunted Tournament of Champions started today on a golf course financed by Teamster union pension funds and in an atmosphere sprinkled with hoodlum figures.

"The tournament, involving a cream of the crop field of the past year's tour winners only, is in its third year at a spa owned by former Las Vegas casino operators, some with ties to organized crime.

"Since the club's beginning seven years ago, many high level personalities have been drawn to the posh retreat, where known hoodlums have mingled with unsuspecting guests.

"An almost constant surveillance by authorities, despite a club operation that has remained officially circumspect, has turned up a parade of underworld figures, some with ties reaching back to Lucky Luciano, Bugsy Siegel and Al Capone.

"It also was learned that a federal task force is being assembled in nearby San Diego to explore all aspects of the multimillion-dollar operation.

"The investigators have been attracted by a list of owners that includes Allard Roen, an admitted stock swindler, and Morris (Moe) Dalitz, a former Cleveland gambling kingpin and head of the old Mayfield Road gang.

"Roen, who is general chairman of the P.G.A.-sponsored tournament, started the La Costa operation in 1964 with Dalitz, Irwin Molasky, Merv Adelson and Harry Lahr. All of the latter are former operators of the Desert Inn in Las Vegas who fled the casino after Nevada gambling authorities and federal agents began probing skimming operations charges.

"The secluded retreat, favored by many politicians, executives, sports figures and show business personalities, originally was financed by an $18.6 million loan from the Teamsters central state pension fund, based in Chicago.

"Agent for the deal was Allen Dorfman, longtime associate of imprisoned Teamster boss Jimmy Hoffa and intended victim of a 1967 gangland assassination plot. Dorfman also has a home on the La Costa grounds."

Walter Sheridan, The Fall and Rise of Jimmy Hoffa (Saturday Review Press), 1972

"The loan activities of the Pension Fund have been even worse since Hoffa's conviction for defrauding it. The fund continued to pour millions of dollars into Las Vegas hotels and mob-controlled gambling casinos. When Morris 'Moe' Dalitz and other racketeers who controlled the Desert Inn in Las Vegas decided to sell out because of increasing federal surveillance of their activities, they moved to La Costa, near San Clemente, California, and built Rancho La Costa Country Club with $27,000,000 in loans from the Pension Fund. The club has become a mecca for racketeers from all over the country. Allen Dorfman has a home on the property."

Los Angeles Times, March 28, 1973

"Debate continued Tuesday over two of City Councilman Tom Bradley's mayoral campaign contributors who have done business with Las Vegas gamblers.

"There were these developments on an issue that has become a subject of controversy in the final week of the mayoral campaign:

"— Bradley accused two of his foes, former Police Chief Tom Reddin and City Councilman Joel Wachs, of 'McCarthyism' and using 'guilt by association' in criticizing the Bradley campaign contributors, Merv Adelson and Irwin Molasky, both businessmen. . . .

"— Adelson, who had denied having a Nevada gambling license Monday, was disclosed Tuesday to be the holder of a license for three slot machines in his Las Vegas liquor store.

"Molasky and Adelson's father also are holders of the license, according to the Nevada Gaming Board. . . .

"At the center of the controversy are businessmen Adelson and Molasky, both shareholders in the La Costa Country Club near San Diego, a plush resort financed by an $18 million loan from the Teamsters Central States, Southeast, Southwest, Teamsters Pension Fund.

"One of their partners in La Costa, and in other business dealings, is Morris (Moe) Dalitz, former owner of the Desert Inn and Stardust, Las Vegas gambling casinos.

"According to testimony presented to the Kefauver Crime Commission in 1951, Dalitz was a prohibition era rumrunner, a Cleveland gambling kingpin with organized crime connections. . . .

"Asked why he did not admit holding the license when he was interviewed Monday, Adelson said:

" 'If I didn't say I didn't have a gambling license, it was because I didn't have a thought of it. I was not ducking anything. It was inconsequential, and I didn't even think about it.

" 'I find it laughable that Mr. Wachs and Mr. Reddin find the fact that I leased three slot machines so horrendous. That is all they have tried to establish,' said Adelson.

"Adelson also said that he was mistaken when he told The Times Saturday that he voted for Bradley in 1969. After reading that, an aide for Reddin searched county records and found Adelson had not been a registered voter in Los Angeles County as far back as 1963.

"Adelson said he had lived mostly at La Costa and in Las Vegas the last few years, moving to Los Angeles about a year ago. As for his statement about the vote, he said: 'I suppose I meant I supported him. I always supported Bradley.' . . .

"Reddin said Dalitz and Adelson were 'not just two men who passed in the dark and said hello.'

"Wachs was again disturbed by the fact that the Teamsters Union pension fund had invested in La Costa, and helped with other enterprises in which Dalitz, Adelson and Molasky were involved. . . ."

Las Vegas Sun, March 28, 1973

"A farfetched attempt has been made by opponents of front-running Los Angeles mayoral candidate Tom Bradley to force Bradley to return $52,500 in loans from two Las Vegas businessmen on grounds they have Nevada gambling interests, the Los Angeles Times reported Tuesday.

"The businessmen are Merv Adelson, who, with his father, owns Sherry's liquor store on the Strip, and Irwin

Molasky, a longtime Las Vegas real estate developer. . . .

"Adelson responded quickly to the charges he is a gambler.

" 'If someone calls me a gambler because of the machines (in Sherry's), they would have to call Safeway stores and other supermarket chains gamblers also because practically every store in Las Vegas has slot machines,' Adelson said.

"Referring to his past two per cent interest in the Four Queens, Adelson said, 'I considered the Four Queens an investment, like you consider stock an investment. It was a personal investment and now it is sold. Gambling in Las Vegas, you know, is legal.'

"Repeatedly, Adelson said he is not a gambler, and objects strongly when anyone so labels him. . . .

"Asked why he and Molasky and their corporation gave Bradley money in the form of loans instead of as straight campaign contributions, Adelson replied, 'I wanted to get my money back.

" 'I wanted to help Tom (Bradley) win the campaign but I also wanted to get my money back and I have been assured I will.' "

New York Times, April 29, 1973

"The F.B.I. was said to have learned that the next day Mr. Fitzsimmons met with Lou Rosanova, identified by Justice Department sources as an envoy for the Chicago crime syndicate, which sought a percentage of the Los Angeles mob's take on the health plan. . . .

"Rosanova and Mr. Fitzsimmons talked again on Feb. 12 at La Costa, a plush resort and health spa in San Diego County, according to the Orange County and San Diego County authorities. The same authorities reported that a

few hours after that meeting, Mr. Fitzsimmons boarded President Nixon's plane and flew to Washington with the President.

"Both Rosanova-Fitzsimmons meetings were reportedly observed by informants of the Orange County district attorney's office. On Feb. 27, at Las Costa, the same informants say they heard Rosanova boast of a future payoff split between him and Mr. Fitzsimmons."

Los Angeles Times, May 4, 1973

"City Councilman Tom Bradley said Thursday he has paid back $52,500 in campaign funds he got from Mervin Adelson and Irving Molasky, both of whom have Las Vegas gambling connections. . . .

"It was Adelson and his associate Molasky, and the movie and television firm they control, Lorimar Productions, Inc., that put up $50,000 in campaign loans for Bradley in the primary and $2,500 from Adelson in direct contribution. A small repayment of two of the loans was made last month, Bradley said.

"Former Police Chief Tom Reddin, one of Bradley's foes in the primary, charged Adelson, president of La Costa Country Club near Carlsbad, and Molasky have business interests in Las Vegas and 'have a long and close relationship with one of the kingpins of organized crime in America, Morris Barney (Moe) Dalitz.'

"And City Councilman Joel Wachs, another mayoral candidate in the primary, said Dalitz was an investor in the La Costa operation, along with the Central States pension fund of the Teamsters Union . . . ."

Los Angeles Times, May 31, 1973

"The fact is that because of Watergate and the warm Fitzsimmons-White House relationship, some federal and local law enforcement officers seriously question whether

the Nixon administration is committed to uncovering what they say is major scandal — Mafia schemes to loot the [Teamster] union's Central States, Southeast and Southwest Areas Pension Fund. . . .

"One high ranking federal official said, 'My observation is that the Teamster (pension) fund is sort of an open bank to people well connected in Las Vegas and well connected in organized crime.'

"Millions of pension fund dollars have been lent to build Las Vegas casinos and developments like the Teamster-financed La Costa Country Club near Carlsbad in San Diego County, described by a Justice Department attorney as 'the West Coast R & R (rest and recuperation) center for all sorts of hoods from throughout the country.'

"At least part of the investigation into the proposed union health plan — described as 'a possible $1 billion-a-year business' — has centered on meetings at La Costa and in Palm Springs attended by the Teamsters president and known Mafia figures."

San Diego Union, July 19, 1973

"The International Brotherhood of Teamsters has roughly $100 million invested in the San Diego area and 'we're continually looking for new investments,' a vice president of the international union said yesterday.

" 'We like the financial climate in San Diego,' said William Presser of Cleveland, Ohio, who is also one of the 14 trustees who administer the Teamsters Central States Pension Fund, which has the San Diego County investments.

"In the past, Teamster leaders have been hesitant to discuss their business transactions in the San Diego area.

" 'San Diego is a developing area,' he said. 'It is particularly promising in the area of real estate.'

"Presser said in an interview at the close of the union's executive council meeting at La Costa Resort that Teamster investments here are 'extensive, quite extensive. It's hard to come up with an exact dollar value, but I'd say a rough estimate is $100 million.' . . .

"The major San Diego investments include La Costa Resort and real estate development. . . .

"Presser said he realized the Teamster pension fund had been the subject of controversy, including misuse of funds by former Teamster president James Hoffa."

New York Times, September 10, 1973

"C. Arnholt Smith, the California multimillionaire who has been one of President Nixon's closest personal and political associates for more than a quarter of a century, is now the subject of intense scrutiny by Federal investigators, who have become increasingly interested in Mr. Smith's dealings with organized crime figures. . . .

"In the midst of his mounting difficulties, Mr. Smith made a move that is generating even more heat on him and the Westgate-California Corporation, the conglomerate he controls. . . .

"On July 25 it was announced that a San Diego lawyer, John Andrew Donnelly, had been named to the Westgate board of directors. . . .

"Mr. Donnelly has for many years been a subject of much interest to Federal enforcement officials, especially those agents who are part of the fight against organized crime. He has been linked, both as a business associate and a legal representative, to organized crime figures for at least 25 years. . . .

"By far the most fascinating part of Donnelly's history, as far as Federal investigators are concerned, is the role he has played in the fortune of a group of entrepreneurs headed by a former Cleveland racketeer, Morris Barney Dalitz.

"Mr. Donnelly has been both an attorney for and a sometime partner in this group since it bought controlling interest in the Desert Inn Hotel and Casino in Las Vegas, Nev., more than 20 years ago. . . .

"Mr. Donnelly . . . was active in the casino's management during the nineteen-sixties when Federal Bureau of Investigation listening devices planted there disclosed that the gambling profits were being 'skimmed,' and the money delivered to hidden crime syndicate interests. . . . [T]he F.B.I. said that . . . meetings concerning 'skimming' took place there, and that two of the persons involved were Dalitz and Mr. Donnelly.

"Mr. Donnelly has also assisted Dalitz and his colleagues in establishing a plush resort community in northern San Diego County known as La Costa."

New York Times, March 1, 1974

"Allen Dorfman, former teamsters' union pension fund consultant, is enjoying a golfing vacation in Southern California and has yet to be arrested, even though he was charged in a Federal indictment on Feb. 19 in a $1.4-million pension fund fraud.

"According to a number of Justice Department sources, the unusual delayed arrest is a special consideration extended to Mr. Dorfman by a top aide of the United States Attorney in Chicago, where the indictment was returned.

"Mr. Dorfman is the only one of the seven defendants who has not been arrested. . . .

"After the indictment, Mr. Dorfman was spotted by Government agents at La Costa, the resort community in northern San Diego County developed by organized crime figures using teamsters' pension fund money. Mr. Dorfman has a house at La Costa. . . .

"Mr. Dorfman has a history of association with Mafia figures and, after he was indicted, he was seen by law enforcement agents playing golf at La Costa with Lou Rosanova, Chicago-based mobster."

San Diego Daily Transcript, September 9, 1974

"Is the Mafia moving into San Diego in force? In a Los Angeles Times interview published Friday and headlined 'San Diego — It's a New Mother Lode to Mafia Bosses,' Dist. Atty. Ed Miller outlined details of the invasion.

"At a press conference Friday afternoon Miller went into more detail.

" 'Intelligence sources have indicated to me that this invasion is on,' Miller said. 'They are meeting and conferring in San Diego and are discussing actions that touch on San Diego County. Our concern is that they will attempt to gain a foothold here.' . . .

"Miller said there was nothing to keep a second 'Apalachin' convention from meeting in North County at the Teamster-financed La Costa Country Club, a multimillion-dollar development near Carlsbad. . . .

"The original Apalachin conference was held in the small New York town Nov. 14, 1957. More than 60 Mafia crime figures were arrested by state troopers.

"To meet the challenge, Miller has organized a six-member Organized Crime Unit, a Special Investigations Unit, and a Major Frauds unit."

San Diego Union, September 13, 1974

"San Diego, along with the rest of California, is becoming the major target of organized crime syndicates, Atty. Gen. Evelle Younger said yesterday.

"Discussing a confidential report given to the Legislature yesterday, Younger said both legitimate businesses and illegal activities such as bookmaking, are the crime figures' targets. . . .

"The attorney general also said La Costa Country Club and Spa in Carlsbad is a recognized meeting place for crime figures.

" 'Whether they come here for their health or reform or go into business,' he said, 'there has been an influx in recent years. There have been more visits there by top guys than in other places. Whether they like the water or climate, the fact is, they have been making it there.' "

Forbes, August 15, 1975

"[C. Arnholt] Smith also had a long history of dealings with figures associated with organized crime, and provided USNB [United States National Bank] financing for projects run by persons with ties to reputed mobsters. . . .

"Moe Dalitz was kingpin of the notorious Cleveland 'Purple Gang.' He made his money in racketeering, later bootlegging. Nowadays it's resort hotels. Dalitz, Allard Roen, Merv Adelson and Irwin Molasky (the DRAM group) today control the plush 5,600-acre La Costa resort complex located 30 miles south of the former Western White House. La Costa was financed in part by the Teamsters Union Central States Pension Fund. Additional financing was provided by Smith's bank, which in turn had about $20 million worth of Teamster deposits. The deposits were solicited by

Senior Vice President Lew Lipton, a former restaurateur with underworld ties.

"Loans to Rancho La Costa Inc. eventually appeared on the FDIC's list of loans carried on the USNB books without adequate credit information. The guarantors were Dalitz, Roen and Molasky. According to reliable sources, the loans were rollovers of $1-million credits involving 'finders' fees to a La Costa principal."

Newsweek, August 18, 1975

"The most dazzling monument to this bond between the Teamsters and organized crime is Rancho La Costa, a $100 million residential country club and health spa north of San Diego. According to reliable estimates by Overdrive magazine, a trucking-industry publication that has investigated the subject extensively, La Costa is financed in large part by a $57 million loan from the Teamsters' Central States pension fund.

"*Tenant:* La Costa is controlled by four men, including Morris (Moe) Dalitz, a gambler and one-time bootlegger who holds a position of prominence in organized crime, and Allard Roen, who pleaded guilty to conspiracy to defraud thirteen years ago in a $5 million stock swindle. One of their most prominent tenants is Teamsters president Frank Fitzsimmons, who often stays in a condominium on the property. 'Fitz' also holds Teamster executive board meetings at La Costa and each year sponsors the Frank Fitzsimmons Invitational Golf Tournament, where the pinky-ring and white-on-white set mingles with the likes of Frank Sinatra and Bob Hope."

New York Times, October 13, 1975

"The decision of former President Nixon to make his return to public life last week by participating in a golf tournament at the resplendent La Costa Country Club in

California seemed deliberately designed to raise anew all the unanswered questions about his relations with Frank E. Fitzsimmons and the scandal-stained International Brotherhood of Teamsters. . . .

"La Costa itself is emblematic of the ties that have long made law-enforcement officials worry about the links between the teamsters and organized crime. Much of the resort's financing comes from the $1.4-billion Teamsters' Central States pension fund, and underworld figures are prominent among its owners and habitues. One of the cases that resulted in the jailing of Mr. Hoffa involved looting of the huge pension fund. Federal investigators are busily engaged right now in trying to determine whether the fund is still being treated as a grab bag. A good many of those under surveillance were playing in the tournament, companions of the former President. Thus the clumsiness of Mr. Nixon's return to the public eye may inadvertently have performed a useful service by putting a spotlight on the seamy relationship between the teamsters and their mobster associates."

APPENDIX G.

The Hundred-Million-Dollar Resort with Criminal Clientele

LA COSTA

By Lowell Bergman and Jeff Gerth

"I received a call from Ehrlichman in San Clemente telling me . . . to come to California that night so that he could discuss in full detail the problems of how to deal with the forthcoming Senate hearings. Everyone was staying at the La Costa Resort Hotel." — Testimony of John W. Dean III before the Senate Select Committee on Presidential Campaign Activities, June 25, 1973.

"Hell, what's to keep La Costa from becoming the site of [*another*] *Apalachin convention? . . . They could hold a two- or three-day meeting, and we'd never even know the damned thing was going on."* — A San Diego law-enforcement officer, quoted in the Los Angeles *Times*.

Rancho La Costa is a 5,600-acre California coastal complex located thirty miles south of Nixon's San Clemente estate. It is a luxurious arrangement of residential units, a resort hotel, a theater, a golf course, the only AMA-approved health spa in the country, various convention facilities, and a country club. It cost close to $100 million to build, and more than a thousand employees look after its maintenance.

It looks very innocent. But in reality this rich man's playground, patronized by powerful figures from business, labor, and government, was established and is frequented by mobsters.

The greedy manipulations of the men who hold their meetings at La Costa have contributed to a massive bank failure and to a plague of security frauds that have been estimated to cost Americans fifty billion dollars. These manipulations have helped tighten the market for the average citizen trying to borrow money as well as encouraging the

inflationary spiral. In addition, the illicit financial operations planned at La Costa have cost taxpayers uncounted millions of dollars, not only in uncollected income taxes but also in other, more complicated ways.

The interwoven jungle of deals, arrangements, and associations — directed by keen legal and financial architects operating with a seemingly unlimited reserve of cash — has resisted the probings of most investigative reporters and has blunted, or corrupted, most of the official investigations.

The primary founders of La Costa were syndicate "bluebloods." Their roots were in Prohibition rum-running and bust-out gambling. The bulk of the financing for La Costa since its inception ten years ago has come from friends in the scandal-ridden Teamsters Central States Pension Fund. Additional funds were made available by C. Arnholt Smith's United States National Bank of San Diego. A member of Nixon's inner circle along with Bebe Rebozo and Robert Abplanalp, Smith ran into trouble early in the Watergate struggle. In October 1973, the Federal Deposit Insurance Corporation declared his billion-dollar bank insolvent, ending one of the largest financial frauds in history.

Rancho La Costa has been controlled by the Moe Dalitz mob — which includes Dalitz, Allard Roen, Merv Adelson, and Irwin Molasky. (They use the acronym DRAM, made up from the first letters of their last names, as a kind of corporate shorthand.) Dalitz has been a prime mover in transforming organized crime into a financial powerhouse. At seventy-five, he is a senior mentor among the criminal aristocracy. A close friend commented, "You'd never guess who he is if you saw him. He's a little man with a round head who walks around with his arms wrapped behind his back like Groucho Marx."

He and his partners at La Costa represent a major force in entertainment, television (Lorimar Productions, founded by Adelson and Molasky, among others, produces such shows as "The Blue Knight," "The Waltons," etc.), con-

struction, laundries, and, of course, gambling. It was Dalitz who persuaded the then-president of the Teamsters Union, James Riddle Hoffa, to finance Las Vegas casinos, starting with Moe's Desert Inn and related properties, with Teamsters retirement cash.

The La Costa operation is an extension of services the crime syndicate people provide in their Las Vegas casinos. Events at La Costa are regularly featured in society columns and travel sections. This adult playground has attracted glamorous jet-setters as well as a horde of underworld heavyweights. La Costa regulars include John "Jake the Barber" Factor, who has been identified in news reports as a notorious international confidence man and stock swindler; Allen Dorfman, a special consultant to the Teamsters Pension Fund who was convicted of kickbacks and is currently under indictment; Jim Braden (Eugene Hale Brading), mob courier and "lovebird swindler," as he was known in Dallas; Arnold Kimmes, a San Diego "developer" who has served time for fraud; Anthony Giacolone, a mob boss in Detroit; Louis "the Tailor" Rosanova, a Chicago mobster now headquartered in Georgia; and Anthony Spilotro, a notorious thug from Las Vegas.

A veneer of respectability is maintained by a host of resident celebrities, including Sandy Koufax, Hoagy Carmichael, and Desi Arnaz. Country-club members and regular guests such as Frank Sinatra, Bing Crosby, and Dean Martin rub elbows with Henry Ford and others of the established rich.

Moe Dalitz likes gold [sic] and tennis — tastes acquired since the old days. Accordingly, La Costa is studded with more than twenty tennis courts. When Dalitz left his Las Vegas home adjoining the Desert Inn course, it was to relocate in an almost identical house next to the La Costa course — the world's largest and costliest ($2.4 million to date).

The PGA Tournament of Champions, formerly a Desert Inn feature, was moved to California by Dalitz. It typifies

the La Costa style. Each player gets $2,000 plus expenses just for showing up. Until 1971, the 170 crowd-control marshals were active-duty U.S. Marines bussed in daily from Pendleton. They were fed all week and given golf hats and windbreakers for their troubles.

The nerve center of La Costa is the country club, which houses the land-sale office, golf shop, restaurants, swimming pool, and meeting rooms. The latter have been the site of numerous executive-board Teamsters meetings. When business and security are primary, the management makes use of six "executive houses" nearby. Here the most important VIP's can relax, safe from the curious as well as from the surveillance of law-enforcement agencies.

The nature of the clientele makes understandable La Costa's preoccupation with security. A great many important politicians have stayed there. High-ranking White House staff members used La Costa's secure grounds for planning parts of the infamous Watergate coverup. Up until the time this was revealed by John Dean, public figures of both parties could be found taking the waters there. They included Cook County judges and Nevada lawmakers as well as senators and congressmen who took off weight at the spa and hobnobbed with show-business celebrities in the bar.

Republican Senator Jacob Javits of New York was a frequent visitor. Sources close to La Costa claim that Javits was considered a "special guest" who received services on the cuff. Contacted in Washington, the senator acknowledged through an aide that he had stayed at the resort, but insisted he had paid his own bills.

An aide to Arizona's Republican Senator Barry Goldwater told *Penthouse* that the senator has been a "close friend" of C. Arnholt Smith's for some time and that Goldwater has "nothing but sympathy for Smith." As for visits to La Costa on the part of the senator, the aide remarked, "it would surprise me if he hasn't."

And why not? The senator's brother, Robert, was a charter member of La Costa and is a frequent participant in Teamsters outings there — fun things such as the Frank Fitzsimmons Golf Tournament, named in honor of the Teamsters president. Also, the Goldwater family owns a large part of the Valley National Bank of Phoenix. *Penthouse* has documented the use of the Valley National Bank by C. Arnholt Smith to obtain personal funds at a time when federal investigations were tightening a noose around Smith's empire. In July 1973, the SEC alleged that Smith, in violation of the law, was selling debentures issued from his U.S. National Bank after the SEC had filed its suit in May 1973. Some of these debentures were pledged to the Valley National Bank to support loans it had made to Smith.

BIG CRIME IS BIG BUSINESS

The triumvirate of government, business, and organized crime has been a fact of life for years. More recently, labor leaders have joined the club. In their parallel drives for profit and power, the gangsters became businesslike while many entrepreneurs and union leaders adopted gangster methods. Back-room poker players and candy-store bookies have become tycoons controlling billion-dollar cash flows. Former hit men are now experts at security frauds and aspiring Horatio Algers cultivate the fine art of the fix.

The business of the mob has spread everywhere. Lucky Luciano fondly recalled in 1961 how his outfit had "muscled into the milk business. *And we're still there.*" Jonathan Kwitny described in the *Wall Street Journal* how a mob-related "brokerage" business in New York levied a fifty-cent tariff on every 100 pounds of beef brought into the metropolitan area. Kwitny's story went on to detail how payoffs were made to union officials on behalf of the nation's largest beef packer.

The continuity of the La Costa gang's history brings the nature of organized crime into focus. In 1949, when Elliot

Ness (of "Untouchables" fame) was Cleveland's Public Safety Director, he drove Dalitz and his friends from the shores of Lake Erie. The Cleveland Syndicate, while maintaining influence in the East through protégés spent the next twenty years presiding over a hotel and gambling empire in Las Vegas.

The comfortable cover of Las Vegas was destroyed by Attorney General Robert Kennedy. By 1964, DRAM's casinos were infested with wiretaps and special surveillance teams looking for "skim" (unreported income from gambling). Then Allard Roen, Dalitz's favorite uncrowned prince, was forced to plead guilty to a felony rap in what turned out to be one of the largest stock frauds on record. Dalitz himself was enmeshed in a tax-fraud case; he escaped by having his accountant take the rap.

The new heat, along with burgeoning opportunities in real estate, convinced DRAM to shift their base to California.

By the early Sixties, organized crime had a working relationship with San Diego's power elite, C. Arnholt Smith and his ex-shoeshine boy and protégé, John Alessio, exercised total control over San Diego and its neighboring Mexican city of Tijuana. Smith had reigned for a quarter of a century as chief money lord and political boss of San Diego city and county. Through Alessio's Agua Caliente racetrack and international bookmaking operation, the mob could "lay off" huge amounts of money.

Through Alessio, Smith's bank — the U.S. National Bank of San Diego — swelled with the receipts of Tijuana's Caliente track and international bookmaking. North of the border, Alessio became an important figure in the Democratic Party, while Smith rubbed elbows with the Republicans. Smith became, in the words of President Nixon's wife, Pat, "one of our earliest supporters." Until Watergate, he was also one of the biggest supporters.

Most observers of the La Costa phenomenon and organized crime agree that the DRAM group selected San Diego — and particularly its undeveloped northern area — because there was no established syndicate sphere of influence, and the local press was supportive of Smith rule.

The La Costa-Teamsters-Smith relationship was rarely advertised. San Diegans were unaware that their "Man of the Century" was part of an unholy alliance. But as early as 1967 a massive report prepared confidentially for the California Department of Corporations and the State Attorney General's Office began to tie together various groups active in northern San Diego large-scale real-estate transactions and financial manipulations. The report made note of the "efficient organization and communication between various factions making up the total of organized crime."

In addition to the La Costa group the report also focused on the Baptist Foundation of America. This church organization had close ties to the La Costa-Teamster clique. It was a combine of ministers, fast-buck artists, and gangsters who purchased land around northern San Diego County with phony collateral, creating what was to become a $26-million stock fraud.

The greening of La Costa's arid grazing land was costly; but unlike most investors and developers, the La Costa crew had extraordinary resources. Trustees of the Teamsters Central States Pension Fund sit on La Costa's board, and over $50 million in Teamster funds have gone into the work.

Half a million Teamsters members are covered by the Central, Southeast, and Southwest Areas Pension Fund. Unlike the Teamsters' Western Conference fund — which has its assets managed by the Prudential Life Insurance Company as a part of its general investment portfolio — the Central States Fund is handled directly by union officials and handpicked employer representatives. Over $5 million pours into the Chicago head office weekly. With over $1.5 billion in assets, it is the largest private cache of its kind.

The late Irvin J. Kahn, an attorney turned developer, was the largest recipient of Teamsters loans. Over $185 million went to his purchase of some sixty square miles of San Diego real estate just south of La Costa. Kahn's unlimited line of credit with the Pension Fund was due to the good offices of St. Louis attorney Morris Shenker, who was Jimmy Hoffa's chief attorney. Shenker inherited most of Kahn's properties after his sudden death in September, 1973.

Shenker, who has recently been under investigation by a federal strike force and grand jury in St. Louis, has emerged as a top financial arranger. His Byzantine financial maneuvering astounds investigators in and out of government. He first came to national attention twenty-five years ago during the Kefauver hearings. Twenty years later, his mob ties were detailed in a *Life* magazine exposé of former St. Louis Mayor A. J. Cervantes. (Shenker had got himself appointed to the St. Louis crime commission!) Since then, Shenker has shifted headquarters to his Dunes hotel and casino in Las Vegas. He visits San Diego often to oversee his country clubs, hotels, and land developments. He is a regular at high-level La Costa gatherings.

The Central Conference Fund has been involved in fraud and kickback scandals resulting in numerous indictments. All this hasn't bothered them one bit. As a private bank for its favorites, it has provided almost a billion dollars in preferred loans for luxury developments, vast real-estate tracts, slot-machine companies, and gambling casinos. Extensive investigation has uncovered scant evidence of any investments in cooperatives or low- or middle-income housing where rank-and-file Teamsters might reasonably expect to find shelter.

One of the many security-conscious conclaves at La Costa was a gathering on July 17, 1972, of Teamsters officials, organized-crime figures, and major Pension Fund recipients, among others. One of the participants was the son of Jimmy

Hoffa, the former head of the union, who had been convicted of jury tampering and fraud involving the Teamsters Union Pension Fund.

It was at these meetings that the officials formally endorsed Nixon's reelection. Subsequent investigations have revealed that Allen Dorfman — the Pension Fund's special consultant — had already collected $1 million from Teamsters officials and organized-crime figures to donate to the Committee for the Reelection of the President in exchange for Hoffa's release and a "favorable" review of federal investigations into Teamsters officials and friends.

Dorfman lives in a luxury home next to La Costa's lush golf course; in between indictments for kickbacks and fraud involving Fund money, plus a nine-month stint in prison, Dorfman played a prominent role at Teamsters conclaves.

He inherited his interest in the pension fund from his late father, Paul "Red" Dorfman, who was one of the founders. Before his latest indictment for defrauding the fund (February 1974), Dorfman's control was complete. In the words of one insider, "He believes he's immune to everything. His power and authority were about as total as you can get."

Legal guidance for La Costa comes from John Andrew Donnelley, a leading San Diego attorney and power broker. In the late forties, Donnelley had gone to Las Vegas with a client, Wilbur Clark, to help arrange construction of the Desert Inn.

In San Diego, Donnelley became an increasingly important functionary in the Smith machine. In Las Vegas he became chief counsel to the DRAM group. He is credited by some with saving Dalitz and his whole Las Vegas operation from ruin during the Guterma stock-fraud debacle. When Allard Roen, then the Desert Inn's executive director, was forced to plead guilty to fraud in that case, Donnelley took his place.

As a top-notch attorney, his services were invaluable during the intricate legal and financial maneuvering. Federal Tax Court proceedings in 1964 revealed that during the 1950's Donnelley was a key arranger of a series of transactions which the court concluded were "a sort of 'Tinker to Evers to Chance' " — in other words, something on the order of a preconcerted and well-coordinated triple play.

Donnelley covered all bases representing or owning the Martinolich Shipbuilding Company, Refrigerated Transport Co. and National Steel and Shipbuilding and pushing a variety of purchases, loans, slot-machine deals and construction projects.

The other owners involved included Wilbur Clark, Moe Dalitz, and Arnholt Smith. While the matrix of deals and loans involving hundreds of thousands of dollars never resulted in criminal charges they spurred further federal probes into Dalitz's income tax returns.

More importantly, these early deals provide the first evidence of Donnelley's future role in arranging the move to San Diego and as key power broker in the group's internal affairs.

When DRAM began buying up northern San Diego County real estate in 1962, Donnelley helped them set up a string of corporate fronts — Planet, Inc., Star Investment, and the Bagshaw Corporation — with which to take legal title to the initial 2,000 acres.

Donnelley helped coordinate the flow of Teamsters cash into San Diego real estate. His law office has handled over $250 million in Teamsters land investments, and he has admitted in an interview that the various parties he represented were on "friendly" terms.

In 1970, the first crack in the Smith empire appeared — the indictment of John Alessio for over $1 million in tax evasion. Alessio had been transporting large unreported sums of cash in steel drums to San Diego to pay for the renovation of his Hotel Del Coronado (the set for the film

Some Like It Hot). His three-year jail term was eased by frequent vacations outside the federal prison at Lompoc, California.

Alessio's troubles pale before the onslaught that finally overtook Smith in 1973. While his political protector and longtime associate Richard Nixon was hamstrung by daily Watergate revelations, the SEC, the IRS, and the Federal Deposit Insurance Company closed in. In addition, the Justice Department's Organized Crime Section began to investigate Smith's ties to the mob.

All of these complicated interrelationships came together in the matter of La Costa's use of the U.S. National Bank for its business accounts and for the banking of its pension-fund loans.

On October 15, 1973, Lew Lipton, an officer of the bank and an emissary from Smith, was in Miami meeting with Teamsters boss Frank Fitzsimmons and trying to get additional Teamsters deposits for Smith's projects. He was shaken when Fitzsimmons waved a copy of the *Miami Herald* announcing one of the largest bank failures in U.S. history. It was the USNB.

The Federal Deposit Insurance Corporation, which took control of the collapsed bank and which sued Smith and other officers for $410 million in damages, has refused comment on questions relating to the amount of Teamsters money that was on deposit. (The bank's assets merged into the Crocker Bank, which guaranteed deposits on account.)

On July 2, 1974, after a ten-month investigation, a federal grand jury in San Diego returned a twenty-five-count indictment against Smith for secretly funnelling $170 million from his U.S. National Bank. The complex conspiracy alleged in the indictment — there were 165 overt acts — was part of a scheme dubbed the Monster Project by Smith and his closest aides.

To bring the monster down, it had taken all the diligence of the press, the atmosphere of Watergate, and the hard

work of those whom Smith called "government bureaucrats out to get me."

But Smith's arrogance was not shattered. Even after the SEC action (May 31, 1973) forced him to report all large-scale transactions, documents indicate that he continued his wheeling and dealing. And, according to sources with first-hand knowledge, one of his close associates began making overtures to an important government witness against Smith right after his indictment.

THE LANSKY CONNECTION

One important name has been omitted from the La Costa story. Meyer Lansky, the dark eminence of organized crime and the financial brain of Lucky Luciano's original organization, has a long-standing relationship to La Costa. Some even trace La Costa's origins to a trip he made to Alessio's Tijuana racetrack fifteen years ago. Traveling by limousine down the old highway — El Camino Real — Lansky happened on the area. Already familiar with the high-profit marinas and waterways of Miami, he saw its possibilities. The legal and illegal profits of the mob's worldwide operations needed more outlets. Soon after, Lansky's allies were sizing up real estate and laying plans for future development. Five years later, La Costa Country Club opened its doors.

Whether he gave an order or a recommendation is unknown. When *Penthouse* attempted to reach him through his attorney, E. David Rosen, he was unimpressed with this desire to reconstruct history. "I advise you not to try and contact my client," said Rosen.

For forty-five years, Lansky has had a harmonious relationship with La Costa's Moe Dalitz. While Dalitz and his group paid close attention to Las Vegas and the West Coast, Lansky was busy in Florida, Cuba, and the Bahamas. Each in turn cut the other in on "skim," laundering techniques, and new investment opportunities. While Lansky

ruled the Havana gambling scene during the reign of dictator Fulgencio Batista, his Cleveland friends were cut in on his Hotel Nacionál de Cuba.

After Castro closed the gambling factories of Havana, Lansky's group moved to the Bahamas. By 1967, a Royal Commission of Inquiry was digging deep into the financial operations of the Grand Bahama Development Corporation. The deft hand of Lansky appeared in behind-the-scenes planning for the island's new casinos.

Lansky, who generally stayed behind the scenes, worked through Wallace Groves, an experienced financial operator. When the heat increased in the Bahamas, Groves took advantage of La Costa's hospitality, commemorated in a 1968 directive from La Costa official Ben Vitale to the resort's employees:

> Mr. and Mrs. Wallace Groves will be arriving here as a guest of La Costa and Mr. Herman Perl. . . . The principal partners at La Costa are delighted that Mr. Groves is visiting with us. We wish to extend every courtesy and compliment to Mr. Groves and his family to make their stay here a pleasurable and memorable one.

Perl, Vitale, and Groves have all been principals in the Grand Bahama Development Company, now known as Devco. Perl, a mastermind of Bahamas resort sales, had been brought to La Costa to increase profits for the DRAM group.

Lining up the ever-helpful Arnholt Smith's USNB as a prime lender, they moved into condominium development. La Costa became a new city built around the owner's plush real-estate area.

Within the last few years, Groves and Vitale have shifted their California base to Stallion Springs, a resort in the Tehachapi Mountains north of Bakersfield. Similar to La Costa in design, Stallion Springs is owned by Devco, which is now controlled by Groves and his wife.

On January 19, 1970, Lansky reportedly flew in to La Costa accompanied by some superstar swingers of the sports world. Between rounds of golf, Lansky attended meetings with Teamsters Pension Fund controllers and his old friend Moe Dalitz.

Weeks later, he went south to a new and even more exclusive mob retreat in Acapulco, Mexico. After huddling in Acapulco with a variety of old cronies and representatives of the Canadian mob, Lansky managed to elude intelligence agents of three countries. Six months later, the Illinois Bureau of Investigation, examining a small Acapulco hotel called The Towers, discovered that Meyer had used it as a hideaway to lose his pursuers. The Towers, a plush preserve, was owned at that time by La Costa members.

The leadership of La Costa has demonstrated an uncanny ability to grow and survive. Their financial reserves tower over those of rival business groups. Their legal and financial advisers consistently stay one step ahead of law-enforcement investigators, and inquiring citizens are left in the dark as to the real story.

It wasn't until November 30, 1974, in an ABC network news report on Jimmy Hoffa, that La Costa received any unfavorable publicity before a large audience. Ironically, a Los Angeles affiliate of ABC — a network which has aired numerous sports specials from La Costa — mysteriously canceled an earlier investigative report on the resort and its owners.

When anything threatens La Costa, the heavy artillery — money — is rolled out. The technique is Meyer Lansky's legacy to his associates; he has had a lifetime of experience in the laying out of whatever it takes to remain undisturbed.

An example of how La Costa avoids unnecessary trouble is contained in a federal intelligence report on a meeting held there in July 1972. Teamsters executives and various cronies, advisers, and borrowers descended on La Costa to discuss, among other things, protection. A decision was

made to annex La Costa to the tiny coastal town of Carlsbad-by-the-Sea. A new San Diego district attorney hostile to Smith rule had been elected after a series of massive bribery scandals in local government. According to the federal law-enforcement report, "It is believed that the real reason for having this annexation take place is that surveillance by the San Diego Sheriff's office will [now] be restricted." In November 1972, the citizens of Carlsbad voted 41 to 39 to annex La Costa, thereby removing the resort from county jurisdiction.

The financial and political clout of the La Costa group generates a certain powerless feeling and even a fear within the local community. Nearby residents and businessmen speak of "their endless supply of money." A local police officer commented to *Penthouse*, "I used to be assigned to La Costa. I sure was glad when I was transferred. These people are really powerful. They run their own show. Someone could get killed out there and you would never know."

Law enforcement on the state level hasn't been very effective, either. Consider what happened in the late 1960's when the California attorney general's office showed signs of following up criminal activity.

In 1967, the California Department of Corporations report was being prepared. State agents were active in closing down the Baptist Foundation of America security fraud. Well-known mob figures began to have trouble. Jimmy "the Weasel" Fratianno, an infamous hit man, found his movements closely watched. Alessio and his brothers were under constant surveillance. Smith's name began to crop up in more and more intelligence reports. One named his bank as a major supplier of loan money to mob-operated bars and restaurants.

With the election of 1970, all this came to an end. Evelle J. Younger became the new attorney general. After a tumultuous term as district attorney of Los Angeles, Younger had gained a reputation as a "law and order" man. A

consummate opportunist in the Nixon tradition, he soon made it perfectly clear who he thought were the enemies of the people.

Under Younger's leadership, the "yellow peril" took the heat off organized crime in California. His office issued reports and he himself made a straight-faced proclamation that so-called "Chinese youth gangs" represented the newest and greatest threat. The supporting cast in Younger's scenario included Hell's Angels and a wide variety of "militants."

In an interview with *Penthouse* and Katy Butler, a reporter for the San Francisco *Bay Guardian,* Younger could not remember the Baptist Foundation case (a $26-million fraud) or any State investigations of John Alessio and C. Arnholt Smith. This memory lapse becomes understandable after examining the sources of contributions made in support of Younger's campaign during the 1970 election.

First, there was over $45,000 from Conrad Arnholt Smith. Most of it was officially designated as loans from Smith, his daughter, and Smith's political adviser, Frank Thornton. The loans were never repaid, a fact which should have been of some concern to an attorney general. Smith was Younger's largest contributor, because unrepaid loans of this type are actually contributions and have to be reported as such. Said the attorney general: "Mr. Smith and Mr. Thornton apparently borrowed from themselves and spent it with Barnes-Champ [Smith's advertising agency], and I know very little more than that about it."

The repeated failures of state and local law-enforcement agencies suggest that the only apparatus capable of taking on such a complex, sophisticated, multijurisdictional phenomenon is the federal government. But knowledgeable law-enforcement officials are frustrated over the fact that investigations have been miserably inadequate, despite the existence of eighteen strike forces around the country, staffed with specialists from various government agencies

(IRS, FBI, SEC, Post Office, etc.) and directed by capable Justice Department attorneys.

Many suspect that the government's lack of commitment is a reflection of the La Costa group's political power. A high official within a Justice Department organized-crime strike force remarked to *Penthouse,* "They're too smart for us. We'll never put them away."

Because of the complicated financial matters involved, the agency best equipped to deal with the problem is the Intelligence Division of the IRS. As for the Federal Bureau of Investigation — which has four times as many special agents as IRS Intelligence, as well as more criminal jurisdiction and investigative latitude — it has failed historically to combat organized crime.

Rumors that La Costa was to be sold to Japanese interests for $200 million have circulated regularly in the last few years. *Penthouse* has been able to document the fact that discussions have taken place between representatives of La Costa and certain Japanese investors, but except for the purchase of a small parcel of land in the industrial park, nothing firm has emerged from those discussions.

La Costa sales representatives are quick to deny these rumors. Said one official, "This whole package is too complex to sell, and besides we're the only ones who know how to run the place. Even if we sold out to the Japanese, we'd have to stay around for a couple of years to manage the operation."

Whether La Costa is sold or not is a mere detail. It is only a place. If the mob and its friends in business and government fly from La Costa, they will find some new nest.

CRIME AND CORRUPTION

La Costa's image as a posh resort camouflages its strategic importance to big crime. Camouflage is essential to crime, as labor organizations are transformed into company unions

and private fiefdoms through racketeering; politicians swallow the intoxications of wealth, never questioning its sources; and a paper-hungry economy is unable to stop the flood of fraudulent transactions.

The record of C. Arnholt Smith is a classic example. Smith's political "influence" — corrupting politicians and bureaucrats — allowed him to amass a fortune while avoiding regulation of any kind. His final Monster Project nearly destroyed the tuna industry on the West Coast, taxi fleets in thirteen cities, and the livelihoods of thousands of farm and office workers. In addition, two major banks which incurred losses as creditors of Smith's fallen bank — Franklin National and Germany's Bank Herstatt — suffered economic ruin themselves.

The wave of financial corruption and securities fraud is so widespread that major banks are afraid to examine the paper (securities, etc.) they hold as collateral. The reason, according to a Senate probe, was the fear that unknown billions in "assets" would prove to be stolen or counterfeit.

The irresistible nature of crime and corruption permeates society. Over a dozen top corporations and their executives have pleaded guilty to illegal campaign contributions related to Watergate. Nine of the nation's major oil companies were involved in jointly bribing public officials. The country's largest railroad, Penn Central, went bankrupt as a result of a series of fraudulent transactions and investments.

Alliances between crime and wealth are an American tradition. With so much crime at the top, it is hardly surprising that many people see corruption as our dominant characteristic. The La Costa playground is a power center for the organization and proliferation of that corruption.

Credits: *The authors would like to thank the Fund for Investigative Journalism, the Bay Area Institute, Mae Churchill, and Jim Drinkhall for invaluable aid.*

No. 80-853

FILED
JAN 2 1981
MICHAEL RODAK, JR., CLERK

IN THE

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Appellants,

—v.—

RANCHO LA COSTA, INC., a Nevada corporation; LA COSTA LAND COMPANY, an Illinois corporation; LA COSTA MANAGEMENT COMPANY, a California corporation; LA COSTA COMMUNITY ANTENNA SYSTEM, INC., a California corporation; PARADISE HOMES, INC., a California corporation; MERV ADELSON and IRWIN MOLASKY,

Appellees.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

This is a proposed appeal by the defendants in a libel suit from a California decision which denied their motion for partial summary judgment. The case has been pending in California for five and one-half years and is now scheduled for trial in approximately seven weeks (February 10, 1981). The decision appealed from refused to hold the appellees "public figures" as a matter of law prior to trial and held that the libel article was not a qualifiedly privileged communication under a local California statute. This Court previously denied a petition for certiorari by these same appellants from the denial of a substantially identical motion for summary judgment in 1976.[1] The issues presented by this attempted appeal are not new issues but are substantially the same as the issues which the appellants previously attempted to bring before this Court in their prior petition for a writ of certiorari, which was denied. Those issues are:

1. Whether the case is ripe for Supreme Court review when there has been no final judgment but only a determination (the fourth such determination below) that there are triable issues of fact.

2. Whether California's denial of appellants' repetitive motion for summary judgment on the "public figure" issue raises any substantial federal question.

3. Whether the determination that the libel was not qualifiedly privileged under a local California statute has "drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States".

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1 *Penthouse International, Ltd., et al.* v. *Rancho La Costa Inc., et al.*, Dkt. No. 76-1355, *cert. denied*, 431 U.S. 930 (1977).

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No. 80-853

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Appellees.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

MOTION OF APPELLEES TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

This libel action is based upon a grievously defamatory article published in March 1975 by *Penthouse* magazine which falsely accused appellees of (among many other things) being "mobsters", "gangsters" and members of "organized crime" and the Rancho La Costa resort community in Southern

California of being a "syndicate" headquarters where "people could get killed . . . and you would never know". In the five and one-half years the case has been pending in the California Superior Court, the appellants have presented no proof of the charges, but, citing hearsay and claiming anonymous "sources", have repeatedly urged that the case be dismissed without trial. Their motions have been repeatedly denied.

A. The Appellees

The appellee corporations are the owners and operators of the resort and related facilities known as Rancho La Costa, located in Carlsbad, California.[2] The individual appellees, Merv Adelson and Irwin Molasky, are two of the principal stockholders.

Messrs. Adelson and Molasky are private real estate developers. They are also principals of Lorimar Productions, a highly respected television and motion picture production company. They are not well known and they have never engaged in politics or in public life nor have they ever sought to influence any public issue.

In the California courts appellants argued that appellees have influenced public issues secretly, by means of alleged criminal activities. The California Court of Appeal rejected that argument on the ground that the materials submitted to sustain it, mainly clippings from prior articles, were pure hearsay. There was no proof whatsoever that appellees had ever influenced or attempted to influence any public issue.

Appellees submitted sworn statements attesting their innocence, were subjected to extensive depositions and other discovery, answered thousands of questions, produced immense quantities of documents and submitted supporting affidavits including one by the Sheriff of San Diego County (stating that

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2 Appellee Rancho La Costa, Inc. is the parent of the other corporate appellees. None of the corporate appellees has any partially-owned subsidiary.

in years of routine surveillance, there had been no evidence of crime at La Costa), and another by one of the country's foremost organized crime experts, who reviewed the article and the evidence and concluded that the accusations made against appellees were "reckless in the extreme".

Recent investigative articles have confirmed appellees' innocence. The *Los Angeles Times* on February 25, 1979 reported that La Costa "hosts a parade of visitors from among the nation's most respected businesses", and quoted not only the San Diego County Sheriff, but also the California Attorney General's office ("there isn't anything illegal about La Costa"), the Chief Assistant Deputy U.S. Attorney ("a legitimate community"), and the Carlsbad Police Chief ("I think it is a clean operation and was always intended to be"). United Press International published a separate article reporting similar findings.

B. The Appellants

The appellants are the publishers of *Penthouse* magazine, Robert Guccione ("Guccione") and Penthouse International, Ltd. ("Penthouse"), and the two authors of the libel article, Lowell Bergman and Jeff Gerth.

1. Penthouse and Guccione

The record below showed *Penthouse* to be a publication dedicated to salacious exploitation of sex, with virtually no record of serious journalism when the La Costa article was published. Its only prior "organized crime" article (on Lucky Luciano) was exposed in the *New York Times* as a hoax.

Guccione himself has been accused in the press of ties to organized crime. His London gambling casino license was revoked. He has been unable to reinstate it or to obtain a license for a gambling casino in Atlantic City. A casino he operated off the coast of Yugoslavia was closed. Investigative articles have pointed out apparent long-standing links between Guccione and "mob bosses" in Atlantic City, Philadelphia and elsewhere.

A suit brought by Penthouse against the publishers of *Playboy* was recently dismissed by the United States District Court for the Southern District of New York upon findings that Penthouse had repeated the same motions over and over and made a "total mockery" of discovery, accompanied by "subterfuge, misrepresentation and false testimony". The Judge ruled that Guccione, his associate Kathy Keeton, his accountant, and his attorney had all given false testimony in court. *Penthouse International, Ltd.* v. *Playboy Enterprises, Inc.*, 86 F.R.D. 396 (S.D.N.Y. 1980) (appeal pending).

2. Gerth and Bergman

The appellant authors had virtually no experience as journalists prior to the La Costa article. They had published one prior article apiece. Both of their prior articles had focused largely on charges of alleged links between former President Nixon and the "Mafia". They then collaborated on an article for *Penthouse* on the same Nixon-Mafia theme. This was the sum total of their record as published "journalists" when they were commissioned to do the La Costa Article, which was published in March, 1975, featured on the front cover under the title "La Costa: Syndicate in the Sun"—and distributed to millions of readers nationwide.[3]

C. The Proceedings Below

Appellees filed their libel action in May, 1975 to recover damages for defamation and to vindicate their names. Shortly thereafter, appellants moved in the California Superior Court, Los Angeles County, for a summary adjudication that all of the plaintiffs were "public figures" within the principle of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny and that the article was qualifiedly privileged under Section 47(3) of the California Civil Code, which creates a

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3 A *true* copy of the article is attached hereto. The reprinted text included in Appellants' Appendix omits the cover title, graphics and other material of the original, as submitted below.

qualified privilege under state law for certain communications between parties having a mutual interest in the same subject matter. The Superior Court (Thomas W. LeSage, J.) denied the motion with respect to the present appellees, holding that the record presented triable issues of fact. Appellants' petitioned the Court of Appeal and the Supreme Court of California from that ruling but the petitions were rejected. Appellants then presented a petition for certiorari to this Court. This Court denied the petition for certiorari on May 23, 1977.

In 1977 appellants made another motion before a second judge of the Superior Court (Vernon Foster, J.) for a determination that the libel article was qualifiedly privileged pursuant to Section 47(3) of the California Civil Code. That motion was also denied. Judge Foster held that Judge LeSage's ruling was controlling and the same motion would not be heard again in the absence of any new facts or law.

In 1978, defendants made a third motion before a third Judge of the Superior Court (Charles Phillips, J.) requesting a summary determination in advance of trial that appellees are "public figures". Judge Phillips stated at argument that he believed the motion to be purely repetitive and that Judge LeSage had already determined the public figure status of the plaintiffs to be an "issue of fact" for trial. Defendants thereupon withdrew their motion.

In 1979 appellants made a *fourth* motion before a fourth Judge of the Superior Court, (George Dell, J.) for a summary determination in advance of trial that plaintiffs are "public figures" and that the libel article was qualifiedly privileged pursuant to Section 47(3) of the California Civil Code. They cited a portion of the same record that had been before Judge LeSage and presented no new material. This time, however, Judge Dell, despite the prior rulings, granted appellants' motion for partial summary judgment. He ruled that "Plaintiff Rancho La Costa, Inc. is a public figure under the First Amendment" of the Constitution because it "has been a subject of legitimate public controversy" and that plaintiffs

Adelson and Molasky are "public figures" because of their "voluntary involvement" with La Costa. He further held that the La Costa article was qualifiedly privileged pursuant to Section 47(3) of California's Civil Code, because it "concerns matters of legitimate public interest."

Upon appellees' petition for review by writ of mandate, the California Court of Appeal held Judge Dell's summary judgment rulings erroneous and vacated them[4]. The Court held that the Superior Court had applied an improper standard in holding appellees "public figures" because of their alleged "involvement" in a "subject of legitimate public controversy." The Court questioned whether La Costa was a matter of public controversy at all (Appendix B 14) and cited, among other things, the express holding of this Court in *Wolston* v. *Reader's Digest Ass'n*, 443 U.S. 157, 167 (1979) that:

> A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. To accept such reasoning would in effect re-establish the doctrine advanced by the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971), which concluded that the *New York Times* standard should extend to defamatory falsehoods relating to private persons if the statements involved matters of public or general concern. We repudiated this proposition in *Gertz* and in *Firestone*, however, and we reject it again today. (Appendix B 13).

The Court of Appeal further held that the Superior Court's determination that the libel article was qualifiedly privileged pursuant to Section 47(3) of the California Civil Code was in conflict with long-settled California law. The Court cited numerous authoritative California decisions squarely holding that a news article published in a newspaper or magazine of

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4 The opinion of the Court of Appeal is reported at 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 and is set forth as Appendix B to the Jurisdictional Statement.

general circulation—local or national—is not a privileged communication within the meaning of the strictly limited Section 47(3) privilege.

Third, the Court questioned the procedural propriety of the Superior Court's grant of a motion for summary judgment after the same court had previously denied the same motion on the same facts.

The appellants applied to the Court of Appeal for reargument of its decision. The application was denied. They then petitioned the California Supreme Court for a hearing, which was also denied. Appellants then filed this appeal.

It is submitted that the appeal does not present a proper case for this Court's review. The decision below that appellees' "public figure" status presents triable issues was a re-affirmation of the 1976 decision by Judge LeSage, which this Court previously declined to review. The lower court's construction of Section 47(3) of the California Civil Code was purely a matter of state law, raising no federal question at all. The appeal should be dismissed and the case allowed, at long last, to proceed to trial.

MOTION TO DISMISS

Appellees move to dismiss the appeal on the grounds that (1) there has been no final judgment or decree rendered by the highest court of the State of California with respect to the questions sought to be raised on this appeal, nor has there been an effective determination of the litigation; (2) there was no question involved in any of the prior proceedings concerning the validity of any state statute or constitutional provision as repugnant to the federal Constitution or any provision of federal law; (3) the federal questions sought to be raised on this appeal were not timely raised below, and (4) this appeal fails to present a substantial federal question. Each of these grounds is independently sufficient to require dismissal of this appeal.

A. There Has Been No Final Judgment Or Decree By The Highest Court Of California With Respect To The Questions Sought To Be Raised On This Appeal, Nor Has There Been An Effective Determination Of The Litigation.

Under 28 U.S.C. § 1257, only "[f]inal judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed" by this Court. "The finality requirement presupposes, of course, that there is a 'judgment' ". R. Stern & E. Gressman, Supreme Court Practice 173 (5th ed. 1978). In the instant case, although denominated a "judgment" by appellants, the only purported predicate for appeal in this case is the *opinion* of a California intermediate appellate court, directing the denial of a partial summary adjudication and ordering the case to trial. Indeed, appellants' petition to the Supreme Court of California made it clear that they were petitioning for hearing following the "*decision*" or "*opinion*" of the Court.

The petition for a writ of mandate below was not an "original proceeding" but a procedure recognized in California for seeking interlocutory appellate review. The decision of the Court of Appeal granting the writ of mandate did not finally determine the action or even the "public figure" status of the appellees, but ruled only that the issue should be determined at the trial which is scheduled to commence on February 10, 1981.

To provide a proper basis for appellate review by this Court, a state court judgment must be final in two respects:

> It must be subject to no further review or correction in any other state tribunal; *it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.*

Market Street Ry. v. *Railroad Commission*, 324 U.S. 548, 551 (1945) (emphasis added). Plainly, this criterion is not met.

This case meets none of the standards required for those limited instances in which review may lie notwithstanding the fact that further proceedings are contemplated in the state courts. *See Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477-85 (1975). Inasmuch as the "public figure" issue has been expressly reserved for trial, can still be determined one way or the other, and its determination may be such that the alleged federal issue might disappear, this is not a case (1) where the federal issue sought to be raised "is conclusive or the outcome of further proceedings preordained" (*Id.* at 479); or (2) where "the federal issue . . . will survive and require decision regardless of the outcome of further state court proceedings" (*Id.* at 480); or (3) where "the federal claim has been finally decided . . . but . . . later review of the federal issue cannot be had" (*Id.* at 481), or (4) "where reversal of the state court on the federal issue would be preclusive of any further litigation rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come" (*Id.* at 482-83).

B. There Was No Question Involved In Any Of The Prior Proceedings Concerning The Validity Of Any State Statute Or Constitutional Provision As Repugnant To The Federal Constitution Or Any Provision Of Federal Law. Appellants' Attempt To Raise Such An Issue For The First Time Before This Court Is Both Disingenuous And Untimely.

Appellants argue that the Court of Appeal purportedly "sustained the validity of a California statutory privilege against the claim that the statute, as construed by the Court of Appeal, is repugnant to the Equal Protection Clause of the Fourteenth Amendment." (Jurisdictional Statement, p. 2).

The Court of Appeal, however, did not "sustain the validity" of any state statute and was not asked to do so. It applied a well-settled interpretation of Section 47(3) of the California Civil Code which applies to local publications as well as national ones. The appellants never contended below that the

statute, as construed, was "repugnant to the Equal Protection Clause of the Fourteenth Amendment", nor could they have, because Section 47(3) was *not* construed to protect "only 'local' media publications, not national publications", as they contend. (Jurisdictional Statement, p. 2). The leading California case, *Gilman* v. *McClatchy*, 111 Cal. 606, 44 P. 241 (1896), involved a local Sacramento newspaper, the *Evening Bee*, and the rule laid down in that case and followed in subsequent California cases applies equally to local and national publications.

Appellants make the further disingenuous contention that jurisdiction exists because the Court of Appeal purportedly held that the "privacy" clause of the California Constitution (Cal. Const. art. 1, § 1) is " 'paramount' to appellants' First Amendment rights under the United States Constitution". (Jurisdictional Statement, p. 2). The Court below did not so hold. It cited the privacy rights of individuals as one of many factors, including a series of express holdings by the California Supreme Court and other California courts, leading it to conclude that the limited statutory privilege for communications between interested parties was not intended to protect newspapers and magazines from liability for widely published defamatory falsehoods about private persons.

The appellants' papers seeking review of the decision of the Court of Appeal in the Supreme Court of California did not mention the Fourteenth Amendment, did not argue that Section 47(3) had been construed in a manner repugnant to the Equal Protection Clause, and did not contend that the California Constitution's privacy clause, as construed, was void as a matter of federal law. Those contentions are all made for the first time here, and are therefore not only spurious but untimely. For the purpose of jurisdiction pursuant to 28 U.S.C. § 1257(2), the federal question may not be raised for the first time in the jurisdictional statement filed with this Court. *White River Lumber Co.* v. *Arkansas ex rel. Applegate*, 279 U.S. 692, 700 (1929); *Whitney* v. *California*, 274 U.S. 357, 362-63 (1927);

Hiawassee River Power Co. v. *Carolina-Tennessee Power Co.*, 252 U.S. 341, 342-44 (1920).

At most, appellants argued below that their First Amendment rights would be diminished by the decision of the Court of Appeal. They did not attempt to argue that the California Constitution's privacy clause, as construed, is unconstitutional—as would be required to raise the issue for appeal here. As the leading commentary states:

> [I]t is necessary for appeal purposes that *the litigant make specific and plain in the state court his contention that the application of the statute to his particular circumstances would make the statute void under federal law.* If he chooses not to phrase his claim in that manner but argues instead that his federal rights prevent application of the state statute to him, an adverse decision amounts to a denial of his assertion of federal rights rather than a validation of the state statute, and review can be had in the Supreme Court only via certiorari under § 1257(3).

Stern & Gressman, Supreme Court Practice, *supra* at 163-64 (emphasis added). *See also Mergenthaler Linotype Co.* v. *Davis*, 251 U.S. 256, 259 (1920).

The appellants argued at length in the courts below that the Court of Appeal was wrong in its construction of state law. That argument was rejected by the California Supreme Court. It is well-settled that "in respect to the construction of state statutes, the state court's views are completely nonreviewable by the Supreme Court." Stern & Gressman, Supreme Court Practice, *supra* at 165.

C. This Appeal Fails To Present A Substantial Federal Question

Appellants seek to raise federal issues by purporting to find several "holdings" in the so-called "judgment" of the Court of Appeal which are not there at all. The Court of Appeal did not hold that the appellants' public figure evidence was insufficient "because appellants had failed to prove the *truth* of the alleged libel" as contended by appellants (Jurisdictional Statement, p. 7) (emphasis in original) but because they had failed to prove that appellees had thrust themselves into controversy. The Court did not hold that appellees may recover on a theory of strict liability, nor did it hold that they may recover upon a showing of common law malice if they are held to be public figures. (*Id.*) Those issues were never before the Court.

The issues which appellants purport to raise are, in point of fact, "manufactured" solely for the purpose of this appeal and clearly lacking in merit. It is, of course, well-settled that the "mere allegation of a Federal question" does not "suffice to give jurisdiction" and that " '[t]here must be a real substantive question on which the case may be made to turn' . . . 'and not merely a formal, Federal question' ". *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 311 (1902). Where, as here, the questions purportedly raised "are so absolutely devoid of merit as to be frivolous", *id.* at 311, or "are found to be so wanting in substance as not to need further argument", *Milheim* v. *Moffat Tunnel Improvement District*, 262 U.S. 710, 717 (1923), the appeal should be dismissed. *See also* Supreme Court Rule 15.1(h).

MOTION TO AFFIRM

Alternatively, appellees move to affirm the decision of the Court of Appeal on the ground that the decision was clearly correct.

A. Appellants Clearly Are Not Public Figures. At The Very Least, The Court Below Committed No Error In Refusing To Hold Them Public Figures As A Matter Of Law.

Under the decisions of this Court, "public figures" are required to prove knowledge of falsity or "reckless disregard for truth" in order to recover damages for a libel. That harsh burden, first imposed on libeled "public officials" in *New York Times Co.* v. *Sullivan*, *supra*, was extended to libeled "public figures" in the companion cases of *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker*, 388 U.S. 130 (1967).

In *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), this Court affirmed a further extension of the *Times* privilege to a libel suit "by a private individual . . . for a defamatory falsehood in a newscast *relating to his involvement in an event of public or general concern*". *Id.* at 52 (emphasis added). That ruling, however, was later expressly *overruled* in *Gertz* v. *Robert Welch, Inc*, 418 U.S. 323 (1974), where this Court said:

> The need to avoid self-censorship by the news media is . . . not the only societal value at issue.
>
> * * * * *
>
> The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court, as a basic of our constitutional system.' *Rosenblatt v. Baer*, 383 U.S. 75, 92, (1966) (concurring opinion). 418 U.S. at 341

This Court in *Gertz* specifically rejected the standard enunciated in *Rosenbloom*, stating that

> The 'public or general interest' test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake. *Id.* at 346.

The Court in *Gertz* concluded that the *Times* privilege should be confined to "libel actions brought *by public persons*" (*Id.* at 343) (emphasis added); and it defined that term to include (1) persons who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes" and (2) those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" (*Id.* at 345).

The foregoing principles were confirmed in *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), where this Court held that a famous socialite, whose divorce proceeding had become a "cause celebre"—in large part due to her own acts in calling not one but a series of press conferences to publicize it—was *not* a public figure because

> Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it. *Id.* at 453.

Appellants argued before Judge LeSage in 1976, at the time of their first summary judgment motion, that appellees were "public figures" because they were "involved" in a "public controversy". This Court decided *Time, Inc.* v. *Firestone*, *supra*, while the motion was still *sub judice* before Judge LeSage, and there reemphasized that plaintiff Firestone was not only not a "public figure" because she had not "thrust herself" into any public controversy "in order to influence the resolution of the issues involved in it", but also stressed that

> [P]etitioner seeks to equate 'public controversy' with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.* . . . In *Gertz*, however, the Court repudiated this position . . . . *Id.* at 454.

In light of *Gertz* and *Firestone*, Judge LeSage denied the motion, reserved the "public figure" issue for trial, and this Court denied certiorari from that ruling. Subsequent decisions by this Court have confirmed even more clearly that appellees are *not* public figures, and certainly cannot be so held as a matter of law on the record adduced below.

Thus, in *Wolston* v. *Reader's Digest Ass'n*, *supra*, this Court held that the plaintiff, the nephew of convicted spies Myra and Jack Soble, who had been a subject of "a major investigation into the activities of Soviet intelligence agents in the United States" and had "failed to respond to a grand jury subpoena," (*id.* at 162) resulting in an order to show cause why he should not be punished for contempt, was not a "public figure." This Court recognized that Wolston had received heavy publicity at the time of the grand jury proceedings but held that despite that publicity and the obvious importance of the issue of Soviet espionage, he was not a public figure either at the time of the publicity (*id.* at 166 n.7), or at the time of the libelous publication, because he did not voluntarily "engage[] the attention of the public in an attempt to influence the resolution of the issues involved" (*id.* at 168). This Court said that

> It is difficult to determine with precision the 'public controversy' into which petitioner is alleged to have thrust himself. Certainly, there was no public controversy or debate in 1958 about the desirability of permitting Soviet espionage in the United States; all responsible United States citizens understandably were and are opposed to it. *Id.* at 166 n.8.

This Court stated further:

> Petitioner's failure to appear before the grand jury and citation for contempt no doubt were newsworthy, but the simple fact that these events attracted media attention also is not conclusive of the public-figure issue. A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.
>
> * * * * *
>
> Nor do we think that petitioner engaged the attention of the public in an attempt to influence the resolution of the issues involved. Petitioner assumed no 'special prominence in the resolution of public questions.' See *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 351. . . . In short, we find no basis whatsoever for concluding that petitioner relinquished, to any degree, his interest in the protection of his own name. *Id.* at 167-68.

This Court also said:

> This reasoning leads us to reject the further contention of respondents that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction . . . To hold otherwise would create an 'open season' for all who sought to defame persons convicted of a crime. *Id.* at 168.

The same rationale was applied by this Court in *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979). This Court there held that a prominent scientist and administrator who had broad "access to the media", was also *not* a public figure, on the ground that:

> Hutchinson did not thrust himself or his views into public controversy to influence others. Respondents have not identified such a particular controversy; at most, they

> point to concern about general public expenditures . . . . *Id.* at 135.

The present appellees plainly do not fit the "public figure" definition thus enunciated, repeated and reaffirmed by this Court. They did not thrust themselves into any public controversy, nor did any of them attempt to "influence" the resolution of any issue. *See also Vegod Corp.* v. *American Broadcasting Companies, Inc.*, 25 Cal. 3d 763, 160 Cal. Rptr. 97, 603 P.2d 14 (1979), *cert. denied,* 101 S.Ct. 242 (1980) (plaintiffs engaged in widely advertised close-out sale of well-known department store held not to be public figures).

The only "proof" of public figure status presented below was a collection of clippings containing mention of one or more of the appellees. The Court of Appeal properly recognized that such a collection of clippings was not enough to establish public figure status under the decisions of this Court, which all contained records of publicity far more extensive than the appellants alleged against the present appellees.[5]

Thus, the record which this Court rejected as insufficient to show Elmer Gertz to be a "public figure" in *Gertz* v. *Welch* included the following testimony by Elmer Gertz himself:

> . . . I was asked to list all of my writings. That is a job impossible to fulfill because I have written for publication literally since I have been in grammar school. *I have written thousands of articles and reviews for countless publications.*
>
> * * * * *

---

5 The Court of Appeal left remaining fact issues bearing on public figure status for the jury, under proper instructions from the Court. That determination was neither novel nor unconstitutional. See Annot., "Relative Provinces of Court and Jury as to Privileged Occasion and Privileged Communication in the Law of Libel and Slander," 26 A.L.R. 830 (1923), and supplements thereto.

In addition to that I have written a number of books and pamphlets and plays.

I have been interviewed during the course of twenty or thirty years, I suppose by every radio and television station in the State of Illinois at one time or another on news programs, on forums, these conversation programs and many other programs. I suppose I have been on every one of those programs, unrehearsed programs.

In addition to that, I have been on radio or television programs in various parts of the country in connection with cases and on other matters in Dallas, Texas, in New York City, Boston, Massachusetts, in Los Angeles, in Middletown, Connecticut, in Cleveland, Ohio. *I have been literally on hundreds, if not thousands of programs.*

* * * * *

Now, in addition, let me say that I have made speeches. I have spoken before, I would say, every synagogue and temple and many churches in this area and many other parts of the country. I have spoken before a large number of colleges and high schools and even some grade schools. I have made a large number of political speeches in connection with my campaign for election as a delegate to the convention. I have appeared on forums of the Adult Education Council for Greater Chicago, the American Jewish Congress and other organizations.

* * * * *

There has never been a period in my mature life when I haven't made public appearances of some kind. Supplemental Appendix on Appeal in this Court in *Gertz v. Welch*, *supra*, at pp. 13-36, submitted by appellees as part of the record before the Superior Court (emphasis added).

Elmer Gertz was held *not* to be a public figure, as a clear matter of law. This Court rejected his vast record of public prominence as insufficient. It was a much greater record of

public references, appearances and writings—all voluntary—than the record adduced against appellees.

Similarly, the record rejected as insufficient for "public figure" status in *Time, Inc. v. Firestone*, *supra*, showed that Mary Firestone was "prominent among the '400' of Palm Beach society", that her activities "predictably attracted the attention of a sizable portion of the public", that her "appearances in the printed press were evidently frequent enough to warrant her subscribing to a press clipping service", that her marital difficulties had become a "cause celebre" which "attracted national news coverage", that 88 articles had appeared in three Palm Beach newspapers alone, and that "far from shunning the publicity, Mrs. Firestone had several press conferences". 424 U.S. at 485 (dissenting opinion). This Court held she was not a public figure because

> She did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it. *Id.* at 453.

The record rejected as insufficient to make Ilya Wolston a public figure, in *Wolston v. Reader's Digest Ass'n*, *supra*, included a showing that he had been one of the subjects of a "major investigation into the activities of Soviet Intelligence in the United States", a nephew of convicted spies Myra and Jack Soble, that his refusal to appear before a grand jury "immediately attracted the interest of the news media", that he attracted a "flurry of publicity", that at least 22 newspaper stories appeared about him in New York and Washington alone, and that an FBI report named him in a list of alleged Soviet intelligence agents. This Court squarely held

> [T]he undisputed facts do not justify the conclusion . . . that petitioner 'voluntarily thrust' or 'injected' himself into the forefront of the public controversy surrounding the investigation of Soviet espionage in the United States . . . It would be more accurate to say that petitioner was dragged unwillingly into the controversy. The Government

> pursued him in its investigation. . . . A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. 443 U.S. at 166-67.

It is apparent from these cases that "thousands" of books, articles and appearances (even voluntary ones) do not make one a "public figure"—as this Court held in *Gertz*; that press reports so numerous as to warrant retaining a clipping service do not create a "public figure"—as this Court held in *Firestone*; and that suspected involvement in espionage, massive investigation, identification by the FBI as a Soviet spy, and a flurry of publicity about it, do not make a "public figure"—as this Court held in *Wolston*. Clearly, therefore, the appellants' effort to prove the appellees public figures by charging that they have been investigated and by offering a collection of clippings was properly rejected by the Court of Appeal.

The soundness of the decision below is confirmed by the deposition testimony.

Penthouse's managing editor was asked:

> Q Had you ever heard of Mr. Adelson?
>
> A. I don't believe I ever heard of Mr. Adelson.
>
> Q Had you ever heard of Mr. Molasky?
>
> A. I don't believe I ever heard of Mr. Molasky.
>
> (Goode depo., at III, 166).

Another *Penthouse* editor who contributed to the La Costa article was asked:

> Q Had you heard anything of La Costa at that time?
>
> A. No. It was a new subject to me.
>
> * * * * *
>
> Q Had you heard of Merv Adelson?
>
> A. I don't believe I had.

Q Did you hear of Irwin Molasky?

A. Molasky?

Q Yes, Molasky?

A. No.

(Ballad depo., at 11-12)

Similar testimony was given by other editors and by defendant Guccione.

The Superior Court's summary determination that appellees were all "public figures" as a matter of law was plain error. The California Court of Appeal properly vacated that erroneous partial summary judgment.

B. The Court Of Appeal Correctly Held That The *Penthouse* Article Was Not A Privileged Communication Under Section 47(3) Of The California Civil Code. Its Application Of Long-Settled California Law Raises No Federal Question.

The California Supreme Court held at an early date that news reports were not privileged communications at common law, even though their subject matter is of legitimate interest to the public. *Wilson* v. *Fitch*, 41 Cal. 363 (1871).

Section 47(3) of California's Civil Code was later enacted extending a qualified privilege to a communication made "without malice"

> to a person interested therein (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.

Thereafter, the California Supreme Court expressly considered whether, as a matter of statutory construction, Section

47(3) applied to newspaper articles. The defendant in that case, a local Sacramento newspaper, had published a false report (as here) that the plaintiff had committed a crime. It argued that the news article was a privileged communication under Section 47(3) and under the California Constitution because of the public's interest in the news. The California Supreme Court rejected both arguments. *Gilman* v. *McClatchy, supra*. It is stated in a standard California commentary, 4 B. Witkin, Summary of California Law §§ 306-09 (8th ed. 1974), referring to Section 47(3) of the Civil Code, that:

(1) The "interest" applies to a defendant who "is protecting his own pecuniary or proprietary interest".

(2) The required "relation" between the parties to the communication is a contractual, business or similar relationship, such as "between partners, corporate officers and members of incorporated associations," or between "union members [and] union officers".

(3) The "request" referred to must have been in the course of a business or professional relationship.

In *Gilman* v. *McClatchy, supra*, the Court recognized that Section 47(3) had been extended to include fair comment on the conduct of "public officials" but it refused (much as this Court did later in *Gertz* v. *Welch*) to extend the qualified privilege to all matters of "public interest" on the ground that such an extension "would . . . put upon the people a greater evil than that which the constitution sought to prevent."

This principle was repeatedly reaffirmed in subsequent cases. In *Morris* v. *National Federation of the Blind*, 192 Cal. App. 2d 162, 13 Cal. Rptr. 336 (1st Dist. 1961), it was applied to a magazine which (as here) published the accusation that plaintiff was a "racketeer". The Court rejected the contention that the article was a privileged communication under the California Civil Code, Section 47(3), stating:

> Far from showing a communication to parties whose interest warrants the disclosure, this complaint in fact alleges that the magazine in which this article was published is a national . . . magazine of general circulation. Thus it negates a communication designed only for a group of interested persons.

So, too, in *Newby* v. *Times-Mirror Co.*, 46 Cal. App. 110, 188 P. 1008 (3d Dist. 1920), where an attorney sued a newspaper for libel, and the newspaper alleged a privilege under Section 47(3) of the Civil Code, the court held that an article is not privileged "simply because it relates to a subject of public interest".

To the same effect, *see, e.g., Earl* v. *Times-Mirror Co.*, 185 Cal. 165, 196 P. 57 (1921); *Newby* v. *Times-Mirror Co.*, 173 Cal. 387, 160 P. 233 (1916); *Edwards* v. *San Jose Printing & Publishing Society*, 99 Cal. 431, 34 P. 128 (1893). All of these cases involved local California newspapers.

Judge Dell's ruling below ignored those controlling precedents as well as two prior rulings by the Los Angeles County Superior Court in this same case. His decision that the La Costa article was privileged because it "concern[ed] matters of public interest" was plainly incorrect as a matter of California law. The Court of Appeal correctly vacated his decision and the California Supreme Court denied review. The ruling was one of California law. It raised no issue reviewable by this Court.

CONCLUSION

The appeal should be dismissed or, in the alternative, the decision below should be affirmed.

Dated: January 2, 1981

Respectfully Submitted,

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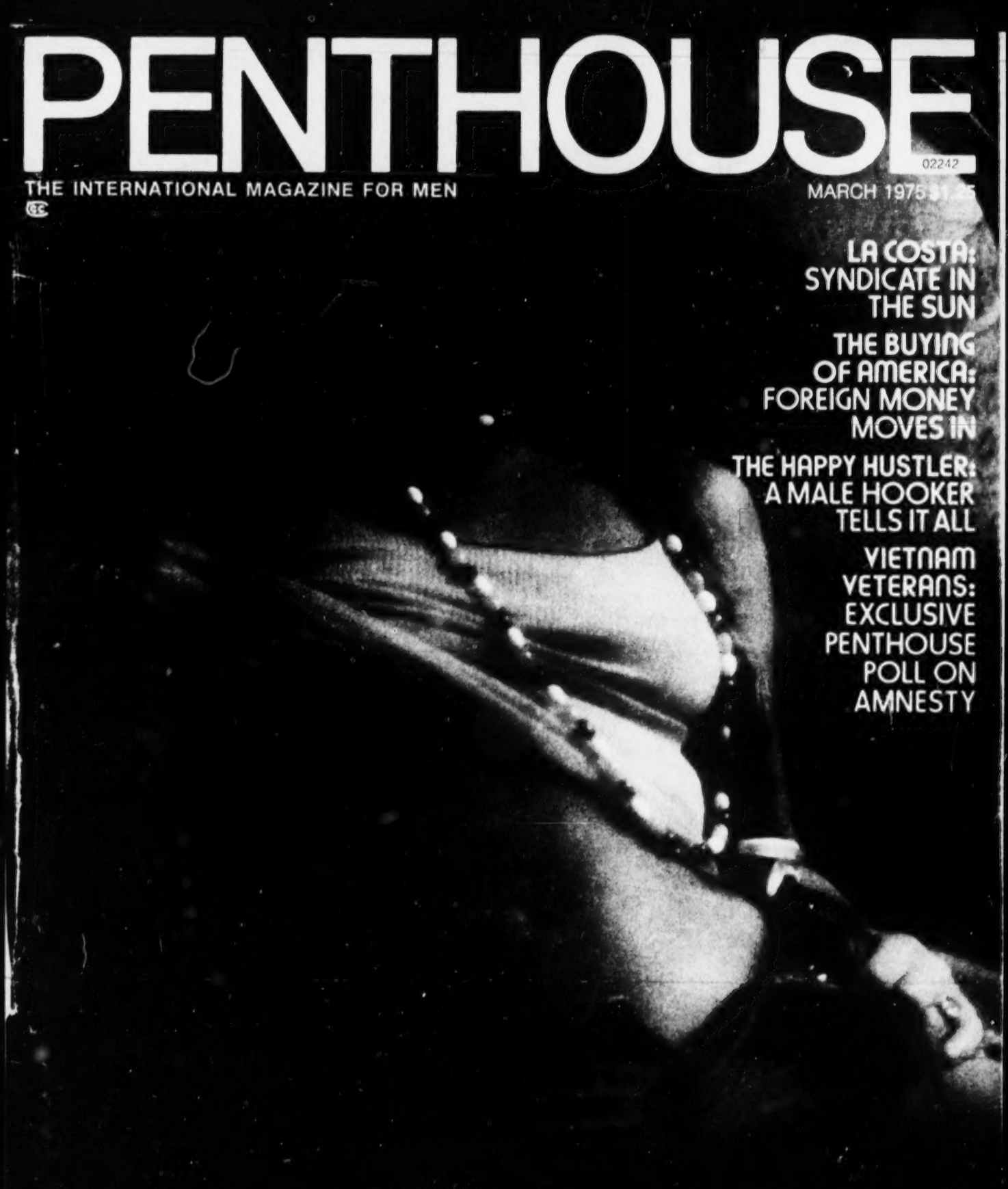
APPENDIX

PENTHOUSE

02242

THE INTERNATIONAL MAGAZINE FOR MEN

MARCH 1975 $1.25



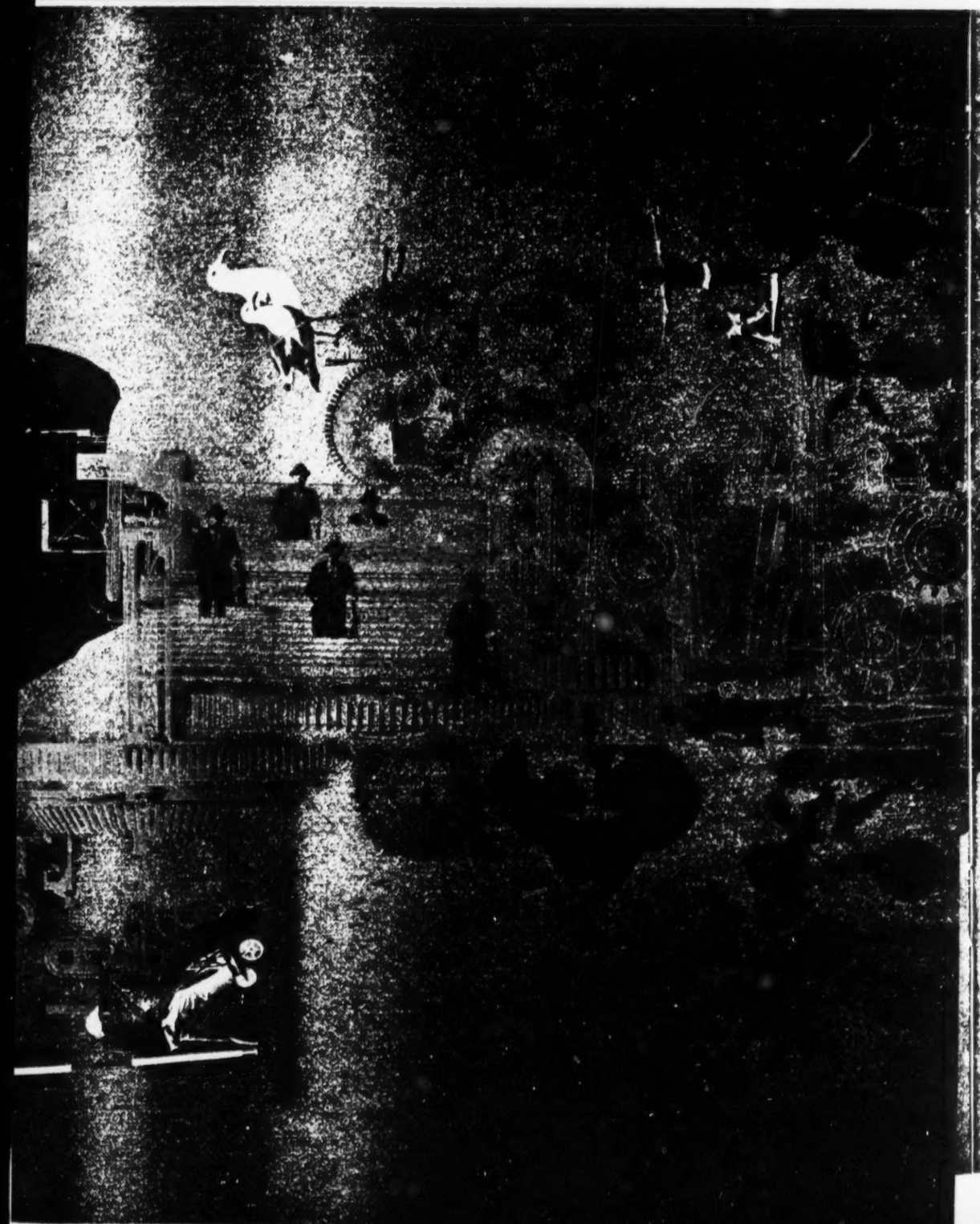
LA COSTA: SYNDICATE IN THE SUN

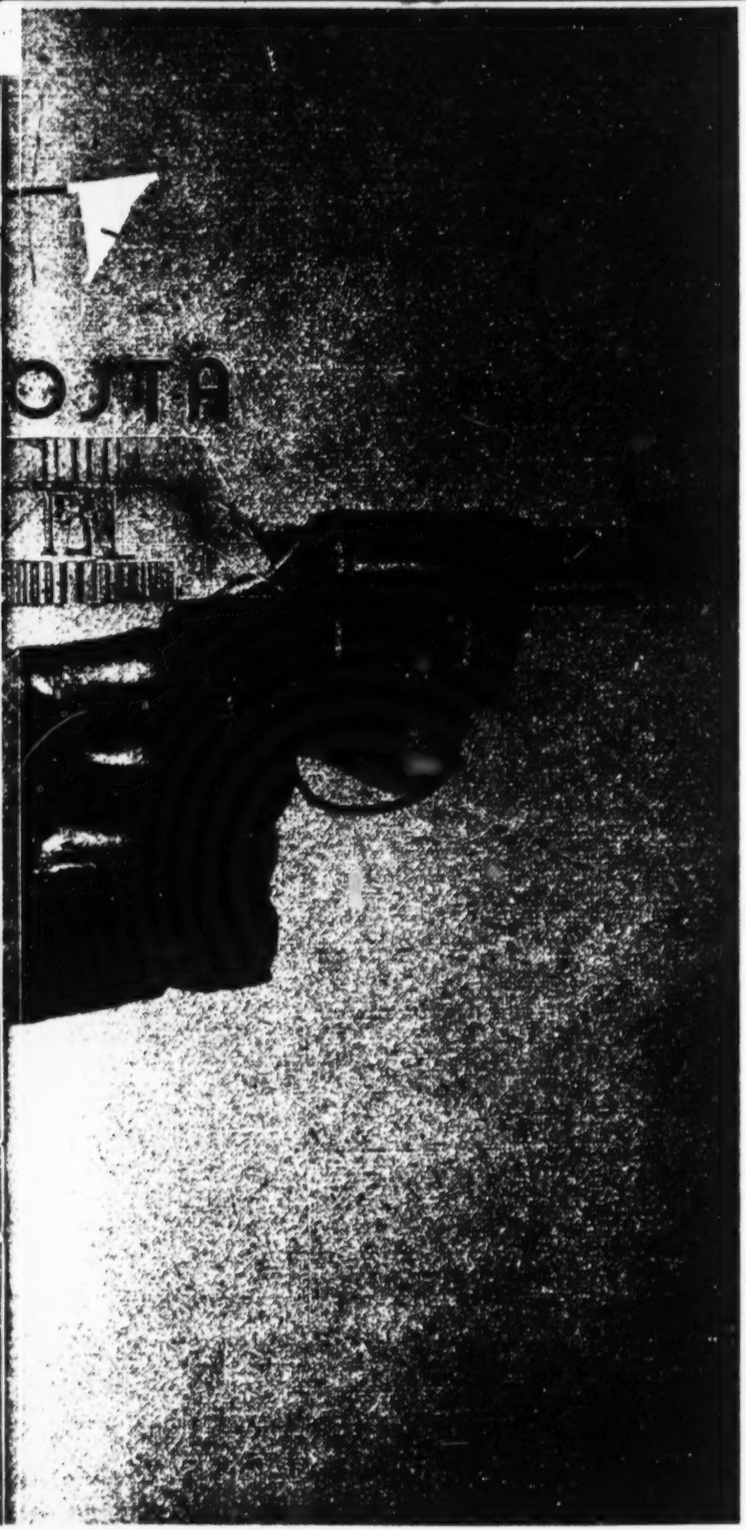
THE BUYING OF AMERICA: FOREIGN MONEY MOVES IN

THE HAPPY HUSTLER: A MALE HOOKER TELLS IT ALL

VIETNAM VETERANS: EXCLUSIVE PENTHOUSE POLL ON AMNESTY

Belgie 120 frs. Danmark 15 kr.inkl.moms. **Deutschland 8.40 DM/France 12 NF/Israel 7.90** Israeli Pounds. Italy 1650 Lire. Japan 750 Yen. Suomi 7.50 F.kr. Nederland 6.90 FL. New Zealand $1.50/**Norge 13 N.kr/Oesterreich 55 Sch. Philippines 18 Pesos** Schweiz 7.90 frs. Sverige 9.50 kr.inkl.moms. Australia $1.50





The Hundred-Million-Dollar
Resort with Criminal Clientele

LA COSTA

By Lowell Bergman and Jeff Gerth

"I received a call from Ehrlichman in San Clemente telling me . . . to come to California that night so that he could discuss in full detail the problems of how to deal with the forthcoming Senate hearings. Everyone was staying at the La Costa Resort Hotel." —Testimony of John W. Dean III before the Senate Select Committee on Presidential Campaign Activities, June 25, 1973.

"Hell, what's to keep La Costa from becoming the site of [another] Apalachin convention? . . . They could hold a two- or three-day meeting, and we'd never even know the damned thing was going on." —A San Diego law-enforcement officer, quoted in the Los Angeles *Times*.

Rancho La Costa is a 5,600-acre California coastal complex located thirty miles south of Nixon's San Clemente estate. It is a luxurious arrangement of residential units, a resort hotel, a theater, a golf course, the only AMA-approved health spa in the country, various convention facilities, and a country club. It cost close to $100 million to build, and more than a thousand employees look after its maintenance.

It looks very innocent. But in reality this rich man's playground, patronized by powerful figures from business, labor, and government, was established and is frequented by mobsters.

The greedy manipulations of the men who hold their meetings at La Costa have contributed to a massive bank failure and to a plague of security frauds that have been estimated to cost Americans fifty billion dollars. These manipulations have helped tighten the market for the average citizen trying to borrow money as well as encouraging the inflationary spiral. In addition, the illicit financial operations planned at La Costa have cost taxpayers uncounted millions of dollars, not only in uncollected income taxes but also in other, more complicated ways.

The interwoven jungle of deals, arrangements, and associations—directed by keen legal and financial architects operating with a seemingly unlimited re-

serve of cash—has resisted the probings of most investigative reporters and has blunted, or corrupted, most of the official investigations.

The primary founders of La Costa were syndicate "bluebloods." Their roots were in Prohibition rum-running and bust-out gambling. The bulk of the financing for La Costa since its inception ten years ago has come from friends in the scandal-ridden Teamsters Central States Pension Fund. Additional funds were made available by C. Arnholt Smith's United States National Bank of San Diego. A member of Nixon's inner circle along with Bebe Rebozo and Robert Abplanalp, Smith ran into trouble early in the Watergate struggle. In October 1973, the Federal Deposit Insurance Corporation declared his billion-dollar bank insolvent, ending one of the largest financial frauds in history.

Rancho La Costa has been controlled by the Moe Dalitz mob—which includes Dalitz, Allard Roen, Merv Adelson, and Irwin Molasky. (They use the acronym DRAM, made up from the first letters of their last names, as a kind of corporate shorthand.) Dalitz has been a prime mover in transforming organized crime into a financial powerhouse. At seventy-five, he is a senior mentor among the criminal aristocracy. A close friend commented, "You'd never guess who he is if you saw him. He's a little man with a round head who walks around with his arms wrapped behind his back like Groucho Marx."

He and his partners at La Costa represent a major force in entertainment, television (Lorimar Productions, founded by Adelson and Molasky, among others, produces such shows as "The Blue Knight," "The Waltons," etc.), construction, laundries, and, of course, gambling. It was Dalitz who persuaded the then-president of the Teamsters Union, James Riddle Hoffa, to finance Las Vegas casinos, starting with Moe's Desert Inn and related properties, with Teamsters retirement cash.

The La Costa operation is an extension of services the crime syndicate people provide in their Las Vegas casinos. Events at La Costa are regularly featured in society columns and travel sections. This adult playground has attracted glamorous jet-setters as well as a horde of underworld heavyweights. La Costa regulars include John "Jake the Barber" Factor, who has been identified in news reports as a notorious international confidence man and stock swindler; Allen Dorfman, a special consultant to the Teamsters Pension Fund who was convicted of kickbacks and is currently under indictment; Jim Braden (Eugene Hale Brading), mob courier and "lovebird swindler," as he was known in Dallas; Arnold Kimmes, a San Diego "developer" who has served time for fraud; Anthony Giacolone, a mob boss in Detroit; Louis "the Tailor" Rosanova, a Chicago mobster now headquartered in Georgia; and Anthony Spilotro, a notorious thug from Las Vegas.

A veneer of respectability is maintained by a host of resident celebrities, including Sandy Koufax, Hoagy Carmichael, and Desi Arnaz. Country-club members and regular guests such as Frank Sinatra, Bing Crosby, and Dean Martin rub elbows with Henry Ford and others of the established rich.

Moe Dalitz likes gold and tennis—tastes acquired since the old days. Accordingly, La Costa is studded with more than twenty tennis courts. When Dalitz left his Las Vegas home adjoining the Desert Inn course, it was to relocate in an almost identical house next to the La Costa course—the world's largest and costliest ($2.4 million to date).

The PGA Tournament of Champions, formerly a Desert Inn feature, was moved to California by Dalitz. It typifies the La Costa style. Each player gets $2,000 plus expenses just for showing up. Until 1971, the 170 crowd-control marshals were active-duty U.S. Marines bussed in daily from Pendleton. They were fed all week and given golf hats and windbreakers for their troubles.

The nerve center of La Costa is the country club, which houses the land-sale office, golf shop, restaurants, swimming pool, and meeting rooms. The latter have been the site of numerous executive-board Teamsters meetings. When business and security are primary, the management makes use of six "executive houses" nearby. Here the most important VIP's can relax, safe from the curious as well as from the surveillance of law-enforcement agencies.

The nature of the clientele makes understandable La Costa's preoccupation with security. A great many important politicians have stayed there. High-ranking White House staff members used La Costa's secure grounds for planning parts of the infamous Watergate coverup. Up until the time this was revealed by John Dean, public figures of both parties could be found taking the waters there. They included Cook County judges and Nevada lawmakers as well as senators and congressmen who took off weight at the spa and hobnobbed with show-business celebrities in the bar.

Republican Senator Jacob Javits of New York was a frequent visitor. Sources close to La Costa claim that Javits was considered a "special guest" who received services on the cuff. Contacted in Washington, the senator acknowledged through an aide that he had stayed at the resort, but insisted he had paid his own bills.

An aide to Arizona's Republican Senator Barry Goldwater told *Penthouse* that the senator has been a "close friend" of C. Arnholt Smith's for some time and that Goldwater has "nothing but sympathy for Smith." As for visits to La Costa on the part of the senator, the aide remarked, "it would surprise me if he hasn't."

And why not? The senator's brother, Robert, was a charter member of La Costa and is a frequent participant in Teamsters outings there—fun things such as the Frank Fitzsimmons Golf Tournament, named in honor of the Teamsters president. Also, the Goldwater family owns a large part of the Valley National Bank of Phoenix. *Penthouse* has documented the use of the Valley National Bank by C. Arnholt Smith to obtain personal funds at a time when federal investigations were tightening a noose around Smith's empire. In July 1973, the SEC alleged that Smith, in violation of the law, was selling debentures issued from his U.S. National Bank after the SEC had filed its suit in May 1973. Some of these debentures were pledged to the Valley National Bank to support loans it had made to Smith.

BIG CRIME IS BIG BUSINESS

The triumvirate of government, business, and organized crime has been a fact of life for years. More recently, labor leaders have joined the club. In their parallel drives for profit and power, the gangsters became businesslike while many entrepreneurs and union leaders adopted gangster methods. Back-room poker players and candy-store bookies have become tycoons controlling billion-dollar cash flows. Former hit men are now experts at security frauds and aspiring Horatio Algers cultivate the fine art of the fix.

The business of the mob has spread everywhere. Lucky Luciano fondly recalled in 1961 how his outfit had "muscled into the milk business. *And we're still there.*" Jonathan Kwitny described in the *Wall Street Journal* how a mob-related "brokerage" business in New York levied a fifty-cent tariff on every 100 pounds of beef brought into the metropolitan area. Kwitny's story went on to detail how payoffs were made to union officials on behalf of the nation's largest beef packer.

The continuity of the La Costa gang's history brings the nature of organized crime into focus. In 1949, when Elliot Ness (of "Untouchables" fame) was Cleveland's Public Safety Director, he drove Dalitz and his friends from the shores of Lake Erie. The Cleveland Syndicate, while maintaining influence in the East through protégés, spent the next twenty years presiding over a hotel and gambling empire in Las Vegas.

The comfortable cover of Las Vegas was destroyed by Attorney General Robert Kennedy. By 1964, DRAM's casinos were infested with wiretaps and special surveillance teams looking for "skim" (unreported income from gambling). Then Allard Roen, Dalitz's favorite uncrowned prince, was forced to plead guilty to a felony rap in what turned out to be one of the largest stock frauds on record. Dalitz himself was enmeshed in a tax-fraud case; he escaped by having his accountant take the rap.

The new heat, along with burgeoning opportunities in real estate, convinced DRAM to shift their base to California.

By the early Sixties, organized crime had a working relationship with San Diego's power elite. C. Arnholt Smith and his ex-shoeshine boy and protégé, John Alessio, exercised total control over San Diego and its neighboring Mexican city of Tijuana. Smith had reigned for a quarter of a century as chief money lord and political boss of San Diego city and county. Through Alessio's Agua Caliente racetrack and international

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LA COSTA

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bookmaking operation, the mob could "lay off" huge amounts of money.

Through Alessio, Smith's bank—the U.S. National Bank of San Diego—swelled with the receipts of Tijuana's Caliente track and international bookmaking. North of the border, Alessio became an important figure in the Democratic Party, while Smith rubbed elbows with the Republicans. Smith became, in the words of President Nixon's wife, Pat, "one of our earliest supporters." Until Watergate, he was also one of the biggest supporters.

Most observers of the La Costa phenomenon and organized crime agree that the DRAM group selected San Diego—and particularly its undeveloped northern area—because there was no established syndicate sphere of influence, and the local press was supportive of Smith rule.

The La Costa-Teamsters-Smith relationship was rarely advertised. San Diegans were unaware that their "Man of the Century" was part of an unholy alliance. But as early as 1967 a massive report prepared confidentially for the California Department of Corporations and the State Attorney General's Office began to tie together various groups active in northern San Diego large-scale real-estate transactions and financial manipulations. The report made note of the "efficient organization and communication between various factions making up the total of organized crime."

In addition to the La Costa group, the report also focused on the Baptist Foundation of America. This church organization had close ties to the La Costa-Teamster clique. It was a combine of ministers, fast-buck artists, and gangsters who purchased land around northern San Diego County with phony collateral, creating what was to become a $26-million stock fraud.

The greening of La Costa's arid grazing land was costly; but unlike most investors and developers, the La Costa crew had extraordinary resources. Trustees of the Teamsters Central States Pension Fund sit on La Costa's board, and over $50 million in Teamster funds have gone into the work.

Half a million Teamsters members are covered by the Central, Southeast, and Southwest Areas Pension Fund. Unlike the Teamsters' Western Conference fund—which has its assets managed by the Prudential Life Insurance Company as a part of its general investment portfolio—the Central States Fund is handled directly by union officials and handpicked employer representatives. Over $5 million pours into the Chicago head office weekly. With over $1.5 billion in assets, it is the largest private cache of its kind.

The late Irvin J. Kahn, an attorney turned developer, was the largest recipient of Teamsters loans. Over $185 million went to his purchase of some sixty square miles of San Diego real estate just south of La Costa. Kahn's unlimited line of credit with the Pension Fund was due to the good offices of St. Louis attorney Morris Shenker, who was Jimmy Hoffa's chief attorney. Shenker inherited most of Kahn's properties after his sudden death in September 1973.

Shenker, who has recently been under investigation by a federal strike force and grand jury in St. Louis, has emerged as a top financial arranger. His Byzantine financial maneuvering astounds investigators in and out of government. He first came to national attention twenty-five years ago during the Kefauver hearings. Twenty years later, his mob ties were detailed in a *Life* magazine exposé of former St. Louis Mayor A. J. Cervantes. (Shenker had got himself appointed to the St. Louis crime commission!) Since then, Shenker has shifted headquarters to his Dunes hotel and casino in Las Vegas. He visits San Diego often to oversee his country clubs, hotels, and land developments. He is a regular at high-level La Costa gatherings.

The Central Conference Fund has been involved in fraud and kickback scandals resulting in numerous indictments. All this hasn't bothered them one bit. As a private bank for its favorites, it has provided almost a billion dollars in preferred loans for luxury developments, vast real-estate tracts, slot-machine companies, and gambling casinos. Extensive investigation has uncovered scant evidence of any investments in cooperatives or low- or middle-income housing where rank-and-file Teamsters might reasonably expect to find shelter.

One of the many security-conscious conclaves at La Costa was a gathering on July 17, 1972, of Teamsters officials, organized-crime figures, and major Pension Fund recipients, among others. One of the participants was the son of Jimmy Hoffa, the former head of the union, who had been convicted of jury tampering and fraud involving the Teamsters Union Pension Fund.

It was at these meetings that the officials formally endorsed Nixon's reelection. Subsequent investigations have revealed that Allen Dorfman—the Pension Fund's "special consultant"—had already collected $1 million from Teamsters officials and organized-crime figures to donate to the Committee for the Reelection of the President in exchange for Hoffa's release and a "favorable" review of federal investigations into Teamsters officials and friends.

Dorfman lives in a luxury home next to La Costa's lush golf course; in between indictments for kickbacks and fraud involving Fund money, plus a nine-month stint in prison, Dorfman played a prominent role at Teamsters conclaves.

He inherited his interest in the pension fund from his late father, Paul "Red" Dorfman, who was one of the founders. Before his latest indictment for defrauding the fund (February 1974), Dorfman's control was complete. In the words of one insider, "He believes he's immune to everything. His power and authority were about as total as you can get."

Legal guidance for La Costa comes from John Andrew Donnelley, a leading San Diego attorney and power broker. In the late Forties, Donnelley had gone to Las Vegas with a client, Wilbur Clark, to help arrange construction of the Desert Inn.

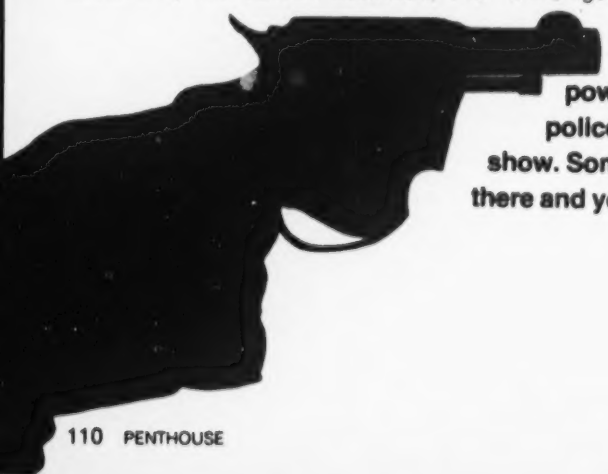
In San Diego, Donnelley became an increasingly important functionary in the Smith machine. In Las Vegas he became chief counsel to the DRAM group. He is credited by some with saving Dalitz and his whole Las Vegas operation from ruin during the Guterma stock-fraud debacle. When Allard Roen, then the Desert Inn's executive director, was forced to plead guilty to fraud in that case, Donnelley took his place.

As a top-notch attorney, his services were invaluable during the intricate legal and financial maneuvering. Federal Tax Court proceedings in 1964 revealed that during the 1950's Donnelley was a key arranger of a series of transactions which the court concluded were "a sort of 'Tinker to Evers to Chance' "—in other words, something on the order of a preconcerted and well-coordinated triple play.

Donnelley covered all bases, representing or owning the Martinolich Shipbuilding Company, Refrigerated Transport Co., and National Steel and Shipbuilding and pushing a variety of purchases, loans, slot-machine deals, and construction projects.

The other owners involved included Wilbur Clark, Moe Dalitz, and Arnholt Smith. While the matrix of deals and loans involving hundreds of thousands of dollars never resulted in criminal charges, they spurred further federal probes into Dalitz's income tax returns.

More importantly, these early deals provide the first evidence of Donnelley's future



" 'These people are really powerful,' said one California policeman. 'They run their own show. Someone could get killed out there and you would never know it.' "

role in arranging the move to San Diego and as key power broker in the group's internal affairs.

When DRAM began buying up northern San Diego County real estate in 1962, Donnelley helped them set up a string of corporate fronts—Planet, Inc., Star Investment, and the Bagshaw Corporation—with which to take legal title to the initial 2,000 acres.

Donnelley helped coordinate the flow of Teamsters cash into San Diego real estate. His law office has handled over $250 million in Teamsters land investments, and he has admitted in an interview that the various parties he represented were on "friendly" terms.

In 1970, the first crack in the Smith empire appeared—the indictment of John Alessio for over $1 million in tax evasion. Alessio had been transporting large unreported sums of cash in steel drums to San Diego to pay for the renovation of his Hotel Del Coronado (the set for the film *Some Like It Hot*). His three-year jail term was eased by frequent vacations outside the federal prison at Lompoc, California.

Alessio's troubles pale before the onslaught that finally overtook Smith in 1973. While his political protector and longtime associate Richard Nixon was hamstrung by daily Watergate revelations, the SEC, the IRS, and the Federal Deposit Insurance Company closed in. In addition, the Justice Department's Organized Crime Section began to investigate Smith's ties to the mob.

All of these complicated interrelationships came together in the matter of La Costa's use of the U.S. National Bank for its business accounts and for the banking of its pension-fund loans.

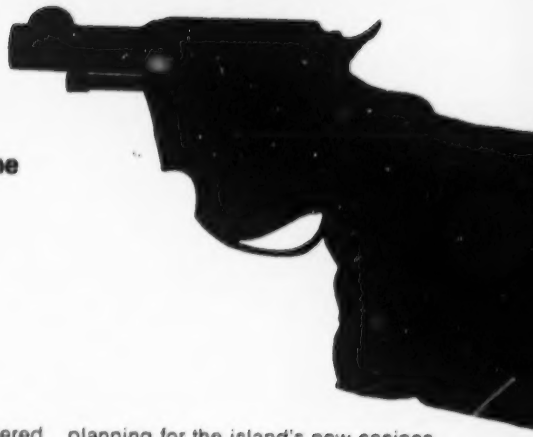
On October 15, 1973, Lew Lipton, an officer of the bank and an emissary from Smith, was in Miami, meeting with Teamsters boss Frank Fitzsimmons and trying to get additional Teamsters deposits for Smith's projects. He was shaken when Fitzsimmons waved a copy of the *Miami Herald* announcing one of the largest bank failures in U.S. history. It was the USNB.

The Federal Deposit Insurance Corporation, which took control of the collapsed bank and which sued Smith and other officers for $410 million in damages, has refused comment on questions relating to the amount of Teamsters money that was on deposit. (The bank's assets merged into the Crocker Bank, which guaranteed deposits on account.)

On July 2, 1974, after a ten-month investigation, a federal grand jury in San Diego returned a twenty-five-count indictment against Smith for secretly funnelling $170 million from his U.S. National Bank. The complex conspiracy alleged in the indictment—there were 165 overt acts—was part of a scheme dubbed the Monster Project by Smith and his closest aides.

To bring the monster down, it had taken all the diligence of the press, the atmosphere of Watergate, and the hard work of those whom Smith called "government bureaucrats out to get me."

"Many people suspect that the government's inadequate investigation of La Costa is a reflection of the group's political power."



But Smith's arrogance was not shattered. Even after the SEC action (May 31, 1973) forced him to report all large-scale transactions, documents indicate that he continued his wheeling and dealing. And, according to sources with firsthand knowledge, one of his close associates began making overtures to an important government witness against Smith right after his indictment.

THE LANSKY CONNECTION

One important name has been omitted from the La Costa story. Meyer Lansky, the dark eminence of organized crime and the financial brain of Lucky Luciano's original organization, has a long-standing relationship to La Costa. Some even trace La Costa's origins to a trip he made to Alessio's Tijuana racetrack fifteen years ago. Traveling by limousine down the old highway—El Camino Real—Lansky happened on the area. Already familiar with the high-profit marinas and waterways of Miami, he saw its possibilities. The legal and illegal profits of the mob's worldwide operations needed more outlets. Soon after, Lansky's allies were sizing up real estate and laying plans for future development. Five years later, La Costa Country Club opened its doors.

Whether he gave an order or a recommendation is unknown. When *Penthouse* attempted to reach him through his attorney, E. David Rosen, he was unimpressed with this desire to reconstruct history. "I advise you not to try and contact my client," said Rosen.

For forty-five years, Lansky has had a harmonious relationship with La Costa's Moe Dalitz. While Dalitz and his group paid close attention to Las Vegas and the West Coast, Lansky was busy in Florida, Cuba, and the Bahamas. Each in turn cut the other in on "skim," laundering techniques, and new investment opportunities. While Lansky ruled the Havana gambling scene during the reign of dictator Fulgencio Batista, his Cleveland friends were cut in on his Hotel Nacional de Cuba.

After Castro closed the gambling factories of Havana, Lansky's group moved to the Bahamas. By 1967, a Royal Commission of Inquiry was digging deep into the financial operations of the Grand Bahama Development Corporation. The deft hand of Lansky appeared in behind-the-scenes planning for the island's new casinos.

Lansky, who generally stayed behind the scenes, worked through Wallace Groves, an experienced financial operator. When the heat increased in the Bahamas, Groves took advantage of La Costa's hospitality, commemorated in a 1968 directive from La Costa official Ben Vitale to the resort's employees:

> Mr. and Mrs. Wallace Groves will be arriving here as a guest of La Costa and Mr. Herman Perl. . . . The principal partners at La Costa are delighted that Mr. Groves is visiting with us. We wish to extend every courtesy and compliment to Mr. Groves and his family to make their stay here a pleasurable and memorable one.

Perl, Vitale, and Groves have all been principals in the Grand Bahama Development Company, now known as Devco. Perl, a mastermind of Bahamas resort sales, had been brought to La Costa to increase profits for the DRAM group.

Lining up the ever-helpful Arnholt Smith's USNB as a prime lender, they moved into condominium development. La Costa became a new city built around the owner's plush real-estate area.

Within the last few years, Groves and Vitale have shifted their California base to Stallion Springs, a resort in the Tehachapi Mountains north of Bakersfield. Similar to La Costa in design, Stallion Springs is owned by Devco, which is now controlled by Groves and his wife.

On January 19, 1970, Lansky reportedly flew in to La Costa accompanied by some superstar swingers of the sports world. Between rounds of golf, Lansky attended meetings with Teamsters Pension Fund controllers and his old friend Moe Dalitz.

Weeks later, he went south to a new and even more exclusive mob retreat in Acapulco, Mexico. After huddling in Acapulco with a variety of old cronies and representatives of the Canadian mob, Lansky managed to elude intelligence agents of three countries. Six months later, the Illinois Bureau of Investigation, examining a small Acapulco hotel called The Towers, discovered that Meyer had used it as a hideaway to lose his pursuers. The Towers, a plush preserve, was owned at that time by La Costa members.

The leadership of La Costa has demon-

strated an uncanny ability to grow and survive. Their financial reserves tower over those of rival business groups. Their legal and financial advisers consistently stay one step ahead of law-enforcement investigators, and inquiring citizens are left in the dark as to the real story.

It wasn't until November 30, 1974, in an ABC network news report on Jimmy Hoffa, that La Costa received any unfavorable publicity before a large audience. Ironically, a Los Angeles affiliate of ABC—a network which has aired numerous sports specials from La Costa—mysteriously canceled an earlier investigative report on the resort and its owners.

When anything threatens La Costa, the heavy artillery—money—is rolled out. The technique is Meyer Lansky's legacy to his associates; he has had a lifetime of experience in the laying out of whatever it takes to remain undisturbed.

An example of how La Costa avoids unnecessary trouble is contained in a federal intelligence report on a meeting held there in July 1972. Teamsters executives and various cronies, advisers, and borrowers descended on La Costa to discuss, among other things, protection. A decision was made to annex La Costa to the tiny coastal town of Carlsbad-by-the-Sea. A new San Diego district attorney hostile to Smith rule had been elected after a series of massive bribery scandals in local government. According to the federal law-enforcement report, "It is believed that the real reason for having this annexation take place is that surveillance by the San Diego Sheriff's office will [now] be restricted." In November 1972, the citizens of Carlsbad voted 41 to 39 to annex La Costa, thereby removing the resort from county jurisdiction.

The financial and political clout of the La Costa group generates a certain powerless feeling and even a fear within the local community. Nearby residents and businessmen speak of "their endless supply of money." A local police officer commented to *Penthouse*, "I used to be assigned to La Costa. I sure was glad when I was transferred. These people are really powerful. They run their own show. Someone could get killed out there and you would never know."

Law enforcement on the state level hasn't been very effective, either. Consider what happened in the late 1960's when the California attorney general's office showed signs of following up criminal activity.

In 1967, the California Department of Corporations report was being prepared. State agents were active in closing down the Baptist Foundation of America security fraud. Well-known mob figures began to have trouble. Jimmy "the Weasel" Fratianno, an infamous hit man, found his movements closely watched. Alessio and his brothers were under constant surveillance. Smith's name began to crop up in more and more intelligence reports. One named his bank as a major supplier of loan money to mob-operated bars and restaurants.

With the election of 1970, all this came to an end. Evelle J. Younger became the new attorney general. After a tumultuous term as district attorney of Los Angeles, Younger had gained a reputation as a "law and order" man. A consummate opportunist in the Nixon tradition, he soon made it perfectly clear who he thought were the enemies of the people.

Under Younger's leadership, the "yellow peril" took the heat off organized crime in California. His office issued reports and he himself made a straight-faced proclamation that so-called "Chinese youth gangs" represented the newest and greatest threat. The supporting cast in Younger's scenario included Hell's Angels and a wide variety of "militants."

In an interview with *Penthouse* and Katy Butler, a reporter for the San Francisco *Bay Guardian*, Younger could not remember the Baptist Foundation case (a $26-million fraud) or any State investigations of John Alessio and C. Arnholt Smith. This memory lapse becomes understandable after examining the sources of contributions made in support of Younger's campaign during the 1970 election.

First, there was over $45,000 from Conrad Arnholt Smith. Most of it was officially designated as loans from Smith, his daughter, and Smith's political adviser, Frank Thornton. The loans were never repaid, a fact which should have been of some concern to an attorney general. Smith was Younger's largest contributor, because unrepaid loans of this type are actually contributions and have to be reported as such. Said the attorney general: "Mr. Smith and Mr. Thornton apparently borrowed from themselves and spent it with Barnes-Champ [Smith's advertising agency], and I know very little more than that about it."

The repeated failures of state and local law-enforcement agencies suggest that the only apparatus capable of taking on such a complex, sophisticated, multijurisdictional phenomenon is the federal government. But knowledgeable law-enforcement officials are frustrated over the fact that investigations have been miserably inadequate, despite the existence of eighteen strike forces around the country, staffed with specialists from various government agencies (IRS, FBI, SEC, Post Office, etc.) and directed by capable Justice Department attorneys.

Many suspect that the government's lack of commitment is a reflection of the La Costa group's political power. A high official within a Justice Department organized-crime strike force remarked to *Penthouse*, "They're too smart for us. We'll never put them away."

Because of the complicated financial matters involved, the agency best equipped to deal with the problem is the Intelligence Division of the IRS. As for the Federal Bureau of Investigation—which has four times as many special agents as IRS Intelligence, as well as more criminal jurisdiction and investigative latitude—it has failed historically to combat organized crime.

Rumors that La Costa was to be sold to Japanese interests for $200 million have circulated regularly in the last few years. *Penthouse* has been able to document the fact that discussions have taken place between representatives of La Costa and certain Japanese investors, but except for the purchase of a small parcel of land in the industrial park, nothing firm has emerged from those discussions.

La Costa sales representatives are quick to deny these rumors. Said one official, "This whole package is too complex to sell, and besides we're the only ones who know how to run the place. Even if we sold out to the Japanese, we'd have to stay around for a couple of years to manage the operation."

Whether La Costa is sold or not is a mere detail. It is only a place. If the mob and its friends in business and government fly from La Costa, they will find some new nest.

CRIME AND CORRUPTION

La Costa's image as a posh resort camouflages its strategic importance to big crime. Camouflage is essential to crime, as labor organizations are transformed into company unions and private fiefdoms through racketeering; politicians swallow the intoxications of wealth, never questioning its sources; and a paper-hungry economy is unable to stop the flood of fraudulent transactions.

The record of C. Arnholt Smith is a classic example. Smith's political "influence"—corrupting politicians and bureaucrats—allowed him to amass a fortune while avoiding regulation of any kind. His final Monster Project nearly destroyed the tuna industry on the West Coast, taxi fleets in thirteen cities, and the livelihoods of thousands of farm and office workers. In addition, two major banks which incurred losses as creditors of Smith's fallen bank—Franklin National and Germany's Bank Herstatt—suffered economic ruin themselves.

The wave of financial corruption and securities fraud is so widespread that major banks are afraid to examine the paper (securities, etc.) they hold as collateral. The reason, according to a Senate probe, was the fear that unknown billions in "assets" would prove to be stolen or counterfeit.

The irresistible nature of crime and corruption permeates society. Over a dozen top corporations and their executives have pleaded guilty to illegal campaign contributions related to Watergate. Nine of the nation's major oil companies were involved in jointly bribing public officials. The country's largest railroad, Penn Central, went bankrupt as a result of a series of fraudulent transactions and investments.

Alliances between crime and wealth are an American tradition. With so much crime at the top, it is hardly surprising that many people see corruption as our dominant characteristic. The La Costa playground is a power center for the organization and proliferation of that corruption.

Credits: *The authors would like to thank the Fund for Investigative Journalism, the Bay Area Institute, Mae Churchill, and Jim Drinkhall for invaluable aid.*

No. 80-853

IN THE

Supreme Court of the United States

October Term, 1980

PENTHOUSE INTERNATIONAL, LTD., *et al.*,

Appellants,

vs.

RANCHO LA COSTA, INC., *et al.*,

Appellees.

On Appeal from the Court of Appeal of the State of California.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

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Appellees.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

A portion of the record that was available to the Court of Appeal in this proceeding has now been furnished to this Court.[1] A review of that record will readily establish that appellees' motions to dismiss or affirm are replete with factual and legal inaccuracies and are without merit.[2]

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[1]This Court has *not* been furnished with any of appellants' *evidence* in support of the public figure determination. That evidence remains in the custody of the Los Angeles Superior Court. (See appellants' Jurisdictional Statement [J.S.], at 13, n. 10.) This court *has* been furnished with the pleadings and briefs filed in connection with appellees' original proceeding (2d Civil No. 58487) before the Court of Appeal, as well as the record in a prior original proceeding (2d Civil No. 57880) which was incorporated by reference in appellees' Petition in the later proceeding. (See appellees' Petition for Writ of Mandate, filed on or about February 4, 1980, at pp. 2,7.)

[2]Appellees' "Statement of the Case" not only misstates the procedural history of the libel action before the Superior Court, but also contains numerous unsubstantiated and gratuitous slurs directed at appellants' magazine and at appellants' attorneys. Appellants will not waste this Court's time with a response to such unbecoming and irrelevant invective.

I.

APPELLEES' MOTION TO DISMISS IS ENTIRELY WITHOUT MERIT.

A. The Judgment of the Court of Appeal Is a "Final Judgment" Within the Terms of 28 U.S.C. §1257.

Under California law, a petition for a peremptory writ addressed to an appellate court commences an original and distinct legal proceeding. See California Constitution, Article VI, Section 10. Accordingly, this Court has recognized on numerous occasions that the judgment finally disposing of such an original proceeding in California is a "final judgment" within the meaning of 28 U.S.C. §1257. *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 14 (1931). See also, *Madruga v. Superior Court*, 346 U.S. 556, 557 (1954). Even though the effect of the Court of Appeal's judgment is to permit further proceedings in appellees' libel action, that judgment is nonetheless final for purposes of review by this Court. *Rescue Army v. Municipal Court*, 331 U.S. 549, 565 (1947).

B. The Appealable Issues Set Forth in Appellants' Jurisdictional Statement Are Properly Before This Court.

1. As the Court of Appeal Explicitly Found a State Statute To Be "Paramount" To the First Amendment, No Further Inquiry Need Be Made Into the Manner in Which the Issue Was Raised Below.

This Court has repeatedly declared that it is not necessary to consider how a federal question was raised below if the highest state court has made an explicit ruling on the issue. See *e.g., Jenkins v. Georgia*, 418 U.S. 153, 157 (1974).

In the instant proceeding, the Court of Appeal explicitly held that appellees' rights of privacy under the California

Constitution are "paramount" to appellants' First Amendment rights. The Court of Appeal emphasized that:

> "Under the mandate of the recent federal Supreme Court rulings, the right of privacy [in the California constitution] is paramount to the right of free speech when in the exercise of free speech a defendant violates another's privacy by uttering a defamatory lie about him. The right of free speech guaranteed by the state and federal Constitutions does not permit violation of the right of privacy. (B-26)[3]

Appellees attempt to avoid the impact of this astonishing holding by suggesting that the above-quoted statement by the court of Appeal pertained only to the court's interpretation of a California statutory privilege (Section 47(3) of the California Civil Code), not to appellants' federal "public figure" privilege. This suggestion, however, is belied by a careful reading of the opinion of the Court of Appeal.

First, the Court of Appeal itself purported to derive the above-quoted statement from the "mandate of the recent *federal* Supreme Court rulings." Appellants are aware of no recent rulings by this Court which have dealt with the interpretation of Section 47(3) of the California Civil Code. On the contrary, the Court of Appeal was obviously referring to this Court's "public figure" decisions and its understanding of those decisions.

Furthermore, in its concluding instructions to the trial court, the Court of Appeal emphasized that in order for appellants to "prove" the "fact" that appellees are public figures, appellants must convince a *jury* that appellees "willingly . . . relinquished their rights of *privacy*." (B-28)[4]

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[3]Page reference is to Appendix B of appellants' Jurisdictional Statement.

[4]See discussion at page 18-21 of appellants' Jurisdictional Statement.

It is also clear that appellants' First Amendment protections were in fact, undercut by the Court of appeal. For the first time in the history of American jurisprudence, an appellate court held *inter alia* that:

(1) A media defendant is required to offer evidence of the *truth* of an alleged libel as a *pre-condition* to obtaining a determination of the plaintiffs' status as public figures (JS, at 11-14);

(2) The determination of such public figure status—even when based upon uncontroverted evidence[5]—is a question of "fact" to be decided by the *jury* at the time of trial, rather than a question of law to be resolved by the court in advance of trial (JS, at 15-17);[6] and

(3) Appellants' First Amendment privilege, if established at trial, can be defeated by proof of common-law type malice. (JS, at 20)[7]

Appellants respectfully suggest that if any doubt remains as to whether these extraordinary holdings were grounded in the purported "supremacy" of California's privacy provision, this Court should vacate the decision of the Court of Appeal and remand the matter for clarification of the

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[5]There were no material facts in dispute on this issue. No evidence whatsoever was submitted by appellees to the trial court in opposition to appellants' motion for partial summary judgment. The "extremely voluminous" evidence (B-19) amassed by appellants—which the Court of Appeal refused to even look at—stood totally unchallenged before the trial court.

[6]Appellees openly acknowledge that the Court of Appeal so ruled. Moreover, appellees cite no case authority whatsoever for their contention that this ruling is "neither novel nor unconstitutional." (Appellees' Motion, at p. 17, n. 5) Instead, passing reference is made by appellees to an inapposite annotation published in 1923—more than forty years before this Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[7]Appellees attempt to argue that this clearly erroneous holding is to no effect because the issue was "never before the Court [of Appeal]." Under California law, however, such instructions issued to a trial court by an appellate court are binding upon the former. See *Overstreet v. County of Butte*, 57 Cal. 2d 504, 507 (1962).

state court's *ratio decidendi*. See, *e.g.*, *State Tax Commission of Arizona v. Murray Co.*, 364 U.S.. 289 (1960).[8] Alternatively, these extraordinary holdings (whether or not grounded in the supremacy of the state constitution) are sufficiently substantial in their own right to warrant review by this Court by way of certiorari. See 28 U.S.C. §2103.

2. Appellants Properly Challenged the Court of Appeal's Unconstitutional Interpretation of Section 47(3) of the California Civil Code.

The record before this Court clearly demonstrates that appellants challenged the constitutionality of the Court of Appeal's interpretation of Section 47(3) of the California Civil Code at appellants' earliest opportunity. JS, at 22-23.[9]

Appellees argue that the Court of Appeal's judgment did not discriminate in favor of "local" publications at the expense of "national" publications, but instead discriminated in favor of limited circulation publications at the expense of "general circulation" publications.[10] The latter distinction, of course, is neither more rational nor more constitutional than that identified by appellants.

II.

SUMMARY AFFIRMANCE OF THE JUDGMENT BELOW IS UNTHINKABLE.

A. Summary Reversal Would Be Far More Appropriate.

It is inconceivable that this Court would even consider summarily affixing its imprimatur to the unprecedented and unconstitutional holdings of the Court of Appeal.

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[8]*Cf.*, *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940): "[I]t is . . . important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the Federal Constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases."

[9]See also, appellants' Petition for Rehearing, filed on June 23, 1980, at p. 20; Petition of Real Parties in Interest for Hearing (before the California Supreme Court), filed on July 16, 1980, at p. 9, n.4.

[10]Appellees' Motion, at pp. 6-7

As pointed out in appellants' Jurisdictional Statement, the clearest holding of the Court of Appeal may well be the most outrageous set forth in its judgment: That a media defendant can be required to offer evidence of the *truth* of an alleged libel as a *pre-condition* to obtaining a determination of the plaintiffs' status as *public figures*.

Appellees falsely suggest that the Court of Appeal concluded that appellants "had failed to prove that appellees had thrust themselves into controversy." It was *impossible* for the Court of Appeal to reach such a conclusion, because the Court of Appeal refused to review any of appellants' *evidence* on this issue. (B-20; JS, at 11-14)

On the contrary, the judgment of the Court of Appeal directed the trial court to *vacate* its public figure finding, not to *reverse* that finding. And the appellate court made it absolutely clear that the basis of its direction was appellants' conceded failure to offer any evidence intended to prove that the appellees are *in fact* "mobsters" and "associates of mobsters." The Court of Appeal unequivocally stated:

> "It is clear to us that the evidence [supporting the public figure determination] is legally insufficient . . . [O]n the specific question of the status or character of the plaintiffs as 'mobsters', 'gangsters', 'crooks', and 'associates' of crooks, mobsters, etc., the 'evidentiary' material is 99 and 44/100's% pure hearsay. . . . . There is no primary non-hearsay evidence of criminality of the remaining corporate or individual plaintiffs." (B-20)

Thus the Court of Appeal flatly rejected appellants' contention that the *truth* of the alleged libel was completely *irrelevant* to the public figure determination. This holding is at odds with every defamation decision issued by this Court since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Indeed, as this is perhaps the central holding of the

Court of Appeal, the judgment issued by that court should properly be subject to summary *reversal* by this Court.

Even before *this* Court, appellees continue to argue that appellants have yet to present any "proof of the charges" against appellees. This argument is both untrue and, more importantly, irrelevant. The *truth* of the charges directed at appellees for more than fifteen years has no bearing upon the question of whether appellees are public figures.

Rather, it is the fact that such charges have been made at all and repeated in countless public statements[11] that is central to the determination of public figure status. Moreover, appellees' meek and sporadic denials of such charges (see, *e.g.*, JS at F-3, 6-8, 10-12) further encouraged appellants (and other publishers) to *believe* that the charges were true and, in any event, to conclude that appellees' unsavory reputations were in the public domain and were subject to fair comment under the First Amendment.

B. Appellees Must Clearly Be Deemed Public Figures Under the First Amendment.

The issue *never reached* by the Court of Appeal—and the issue which this Court should now address—is the extent to which the First Amendment protects the reporting of the voluntary activities of reputed organized crime figures.

Phrased another way, the question is: *Does the press have a qualified privilege to inform the public in a nonmalicious manner about the voluntary and controversial activities of individuals previously identified by law enforcement (and other) authorities as connected to organized crime*?

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[11]The Court will remember that the public statements set forth in Appendix F to appellants' Jurisdictional Statement represent only the "tip of the iceberg."

To suggest, as appellees have done, that they have never "thrust themselves into controversy" is to rewrite history. Appellees have played central roles in:

(a) a major political controversy concerning their contributions to a mayoral campaign (JS, at F-10-13);

(b) a controvery concerning their hosting of a prestigious professional golf tournament at which the spectators and participants mingled with reputed mobsters (F-8-9);

(c) a controversy about their continued and substantial borrowings from a Teamsters' pension fund which has been under government investigation for more than two decades because of its alleged ties to organized crime (F-1-10, 13-17, 19-20); and

(d) a controversy about their hosting the Frank Fitzsimmons Golf Tournament and its notorious invitees (F-19-20).

All of these controversies have, in turn, occurred against the backdrop of the larger controversy concerning La Costa itself and its disputed reputation as a meeting place for organized crime figures (F-3-5, 8-9, 12-13, 15-20).

In the final analysis, of course, a public figure is whatever this Court defines it to be. But that definition has thus far been developed in only a handful of cases; and in most of those cases this Court has concentrated on explaining who is *not* a public figure rather than who *is* a public figure.

Moreover, in none of those cases has this Court ever suggested (1) how the reputational interests of a *corporation* are to be balanced against the First Amendment's interest in a free press;[12] or (2) how the "broad rules of general

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[12]Nor has this Court ever pointed to any facts which might tend to indicate whether a corporate plaintiff in a defamation action had "voluntarily relinquished its right to privacy" so as to become a public figure. See Jurisdiction Statement at 21. *Cf., Ion Equipment Corp. v. Nelson*, 110 Cal. App. 3d 868, 878 (1980): "It is generally agreed that the right to privacy is one pertaining only to individuals, and that a corporation cannot claim it as such . . . . This is because the tort is of a personal character 'concern[ing] one's feelings and one's own peace of mind.' " [citations omitted]

application'' laid down in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) might be applied to the voluntary but clandestine activities of those associated with organized crime.[13]

At the same time, the task of exposing such clandestine activities is of critical importance to the maintenance of our system of ordered liberties.[14] President Johnson's Commission on Law Enforcement and Administration of Justice (which included Mr. Justice Powell) suggested that the press has not only a right but a *duty* to publish information concerning organized crime. Commission Report (''The Challenge of Crime in a Free Society''), at 484.

But while the press may well have a constitutional responsibility to assist law enforcement in the fight against organized crime, the press has neither the resources nor the capability to prove actual criminality in a court of law.[15]

Only the actual malice standard enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), can provide

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[13]The attempt to apply those ''broad rules'' to the distinctive circumstances of a defamation suit brought by a reputed organized crime figure led one trial court to declare: ''Defining public figures is much like trying to nail a jellyfish to the wall.'' *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976).

[14]Congress had declared: ''[O]rganized crime in the United States is a highly sophisticated, diversified and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; . . . . organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden and interfere with interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens . . . .'' (Public Law 91-452; 84 Stat. 922)

[15]For example, the press cannot offer the services of a Witness Protection Program to protect potential witnesses; the press is rarely privy to the confidential information upon which law enforcement authorities base their identification of organized crime figures; and the press is frequently blocked in its attempt to secure testimony from material witnesses by such impenetrable barriers as the Fifth Amendment privilege against self-incrimination—which has been invoked repeatedly by appellees' reputed associates in the action below.

the press with that "measure of strategic protection" which is necessary to operate effectively in this area of vital concern. The Constitution must permit—and, indeed, *encourage*—nonmalicious reporting concerning the voluntary and controversial activities of reputed organized crime figures.

Since this Court first provided constitutional protection for nonmalicious reporting about a college athletic director and a retired army general, no other subjects have been deemed by this Court worthy of that same protection. As a result, the public perception grows that this Court has effectively abandoned the privilege which it first established fourteen years ago. The time has come to correct that perception and to reaffirm First Amendment liberties in an area where the public's need for "a vigorous and uninhibited press" is both undeniable and urgent.

Conclusion.

For the foregoing reasons, the motions to dismiss or affirm should be denied and this Court should note probable jurisdiction of this appeal.

DATED: February 16, 1981.

Respectfully submitted,

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Attorney for Appellants.

MOTION FILED

NOV 28 1980

No. 80-853

IN THE

Supreme Court of the United States

October Term, 1980

PENTHOUSE INTERNATIONAL, LTD., *et al.*,

Appellants,

vs.

RANCHO LA COSTA, INC., *et al.*,

Appellees.

Motion of The Times Mirror Company, Dow Jones & Company, Inc., McClatchy Newspapers, National Broadcasting Company, Inc., California Newspaper Publishers Association, Inc. and Radio & Television News Association of Southern California for Leave to File Brief as Amici Curiae, and Brief of Amici Curiae in Support of the Jurisdictional Statement and Appeal of Penthouse International, Ltd., et al.

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The Times Mirror Company, Dow Jones & Company, Inc., McClatchy Newspapers, National Broadcasting Company, Inc., California Newspaper Publishers Association, Inc. and Radio & Television News Association of Southern California respectfully move hereby for leave to file the attached brief as *amici curiae* in support of the jurisdictional statement of Penthouse International, Ltd., et al., in their appeal from the Court of Appeal of the State of California. Consent to the filing of said *amici curiae* brief has been

obtained from the appellants. Appellees have refused to consent.

The Times Mirror Company publishes the *Los Angeles Times*, which has a general daily circulation of more than one million copies, the *Orange Coast Daily Pilot* (a California community newspaper), and newspapers in New York, Texas and Connecticut. Dow Jones & Company, Inc. publishes the largest daily newspaper in the United States, *The Wall Street Journal*, and numerous other publications. McClatchy Newspapers publishes *The Sacramento Bee*, and has ownership interests in newspapers in the Western States. The National Broadcasting Company, Inc. operates one of the three major television networks in the United States and owns and operates various television stations, including KNBC in Los Angeles. The California Newspaper Publishers Association, Inc. promotes newspaper publication in the State of California and has approximately 460 California newspapers as members. The Radio & Television News Association of Southern California is composed of persons interested in and involved in newsgathering by the broadcast media.

As such, *Amici* have a vital interest in the adverse effects certain to result from the California Court of Appeal's misapplication of the principles enunciated by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157 (1979). Unless reviewed and corrected by this Court, the California Court of Appeal's decision is certain to deprive the public of access to vitally important reporting concerning organized crime.

Appellants' brief does not focus upon the fact that the California Court of Appeal's decision completely upsets the balance this Court has carefully established between the First Amendment rights of the press and public and a per-

son's right to protect his reputation by suing for libel. *Amici* seek leave to file the attached brief to develop that argument.

Respectfully submitted,

ROBERT S. WARREN and
REX S. HEINKE,

Attorneys for The Times Mirror Company, Dow Jones & Company, Inc., McClatchy Newspapers, National Broadcasting Company, Inc., California Newspaper Publishers Association, Inc. and Radio & Television News Association of Southern California.

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Interest of Amici Curiae.

Amici represent the following substantial media interests in the State of California and elsewhere:

The Times Mirror Company, publisher of the *Los Angeles Times*, which has a general daily circulation of more than one million copies, the *Orange Coast Daily Pilot* (a California community newspaper), and other newspapers in New York, Texas, and Connecticut.

Dow Jones & Company, Inc., publisher of *The Wall Street Journal, Barron's Business and Financial Weekly*, several news services, books and a number of community newspapers. *The Wall Street Journal*, with a circulation of 1.8 million (more than 225,000 in California), is the largest daily newspaper in the United States and is distributed daily in every state.

McClatchy Newspapers, Sacramento, California, publishes *The Sacramento Bee*, *The Modesto Bee* and *The Fresno Bee* with a combined daily circulation in the central valleys of California of more than 450,000 copies. In addition, McClatchy Newspapers publishes various other newspapers, including *The Tri-City Herald* in Pasco, Washington and *The Anchorage Daily News* in Alaska and a number of community newspapers. McClatchy Newspapers also operates four AM and four FM radio stations in California and Nevada, and a television station KMJ-TV, in Fresno, California.

National Broadcasting Company, Inc. ("NBC"), owner and operator of the NBC television network, which serves NBC's five owned and operated television stations, including KNBC, Channel 4, in Los Angeles and numerous affiliated television stations throughout the United States. (NBC also owns and operates a radio network which serves numerous NBC-owned and operated stations as well as affiliated radio stations. NBC itself owns and operates two radio stations in California.)

The California Newspaper Publishers Association, Inc., a California corporation whose purpose is the promotion, preservation and advancement of newspaper publication in the State of California. Its membership consists of approximately 460 newspapers published in the State of California, including all major metropolitan and most community newspapers.

The Radio & Television News Association of Southern California is a non-profit corporation which includes as active members individuals who gather news for the broadcast media and as associate members individuals who are interested in the broadcast media.

On June 6, 1980, the California Court of Appeal determined that appellees, owners of a heavily advertised spa financed by monies from reputed underworld sources, were not public figures and that a media defendant could be held strictly liable for defaming them. *Amici* are convinced that the opinion below drastically constricts the ability of newspapers and broadcasters to report upon the activities of organized crime. *Amici* additionally believe, and will argue in this brief, that the opinion represents a culmination of decisions purporting to find a "trend" against rights of free speech and press and in favor of the "privacy" of those with vast influence over public affairs, who seek to limit the public's knowledge about them to only the desirable aspects of their activities.

Questions Presented.

1. Have the courts of California, purporting to find a "trend" from this Court's decisions and relying upon a State constitutional "right of privacy," restricted this Court's protections of speech and press initiated in *New York Times Co. v. Sullivan* so as to vitiate the goals of the First Amendment and require a review by this Court to restore the proper balance between the First Amendment and protection of reputation?

2. Are the corporate and individual owners of a large, heavily promoted spa, who financed their operation through the controversial Teamsters' Union Central States Pension Fund and who permitted themselves to acquire a widespread and well-publicized reputation of connections with orga-

nized crime, public figures for the purpose of reportage about those activities?

3. May California return to "no fault" principles of defamation in cases where media defendants are unable to prove the subjects of their publications to be public officials or public figures?

ARGUMENT.

The opinion of the court below (106 Cal. App. 3d 646, 165 Cal. Rptr. 347, 6 Media L. Rep. 1351 (1980)), (App. B 1-28) reaches its constrictive result by:

(i) Tracing decisions of this Court from *New York Times Co. v. Sullivan*[1] through *Rosenbloom*,[2] *Gertz*,[3] *Firestone*,[4] *Wolston*[5] and *Hutchinson*[6] and purporting to find a trend of such decisions to narrow sharply the ambit of non-malicious news reportage which is safe from civil punishment and

(ii) Construing the recently promulgated California constitutional right of "privacy" into an interest paramount to protections of speech and press of the reportage of matters of legitimate public interest and concern.

Utilizing such techniques, the California Court of Appeal subjected publishers and broadcasters who attempt to inform the public of the activities of those widely reputed to be connected with organized crime to civil punishment unless they can prove that the subjects of their publications are indeed criminals — a task which thus far has largely eluded the powers of local, state and federal governments.[7]

As noted in the opinion itself, other California courts, including its Supreme Court, have similarly circumscribed

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[1]376 U.S. 254 (1964).
[2]*Rosenbloom v. Metromedia*, 403 U.S. 29 (1971).
[3]*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).
[4]*Time, Inc. v. Firestone*, 424 U.S. 448 (1976).
[5]*Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157 (1979).
[6]*Hutchinson v. Proxmire*, 443 U.S. 111 (1979).
[7]The paucity of convictions does not, of course, indicate that organized crime does not exist. U.S. Department of Justice, National Conference on Organized Crime 18 (recognizing the important role of the media in combating organized crime) and 21-25 (1975); National Advisory Committee on Criminal Justice Standards and Goals, Task Force on Organized Crime 7-33, 137-141 (1976); E. Kefauver, *Crime in America* (1951).

the constitutional protections of news reportage in California. The following holdings are exemplary:

> A public school teacher who admittedly had at least twice become the subject of public concern by reason of her penchant for reading vulgar-language materials to her students was held to be neither a public official nor a public figure required to prove malice when seeking to impose civil damages upon a publisher which criticized that conduct.[8]
>
> Distress merchandisers engaged in a heavily advertised closeout sale from a city landmark department store were held entitled to seek damages for the nonmalicious publication of criticism of the truth of that advertising.[9]

The cumulative sweep of these decisions, capped by the opinion now presented to this Court, grossly inhibits all news reportage save accounts of the noisy doings of politicians and those prone to mount rostrums. The activities of immensely powerful people who affect the lives of citizens in a far more meaningful manner than streetcorner criers is now too dangerous to report. Such people can finance lawsuits through to conclusion and punish publishers by inflicting years of expense and grief, if not ultimate judgments, when freed of the necessity of proving that the publication was maliciously false.[10]

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[8] *Franklin v. Benevolent etc. Order of Elks*, 97 Cal. App. 3d 915, 159 Cal. Rptr. 131 (1979).

[9] *Vegod Corp. v. American Broadcasting Companies, Inc.*, 25 Cal. 3d 763, 160 Cal. Rptr. 97, 603 P.2d 14 (1979), *cert. den. sub nom., American Broadcasting Companies, Inc. v. Western Institute of Retailing, Inc.*, ... U.S. .... (1980).

[10] The significance of the lessened fault standard is not limited to likelihood of eventual judgment. For regardless of the plaintiff's ability to demonstrate damages and secure a jury verdict, a determined plaintiff required only to prove negligence can easily escape summary judgment and secure monetary revenge upon the publisher by provoking and prosecuting years of expensive, time draining litigation. *Compare Yiamouyiannis v. Consumers U. of the United States*, 619 F.2d 932, 940 (2d Cir. 1980), U.S. appeal pending, *with* 6 (Part 2) *Moore's Federal Practice* ¶ 56.17 [42], p. 56-946 & n.4 (summary judgment is ordinarily unavailable in negligence cases).

It is time, surely, for this Court to make clear that the process of balancing the interests of private reputation versus public information initiated in *Gertz* shall not eviscerate the goal sought to be achieved by applying constitutional protections to private libel actions.

> Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. As Mr. Justice Harlan stated, "some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy." *Curtis Publishing Co. v. Butts, supra,* at 152. In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise.[11]

The thrust of recent decisions in California, culminating in the decision below, demonstrates no "anxiety" at all to preserve the "breathing space" necessary to the fruitful exercise of freedom of speech and press. Rather, these decisions choke off reportage of matters of vital concern to the public—here, the involvement of widely reputed crime figures in a supposedly legitimate business.

The appellants have presented uncontroverted evidence which should more than suffice to cause appellees to be held to be public figures under the *Gertz* rationale. They proved:

(a) Appellees are the owners of a large Southern California resort and spa.

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[11]*Gertz v. Robert Welch, Inc., supra,* 418 U.S. 323, at 342.

(b) They heavily promote and advertise that spa as a suitable and desirable place for families and business people to patronize.

(c) They finance their operation through a union pension fund which has been embroiled constantly in scandals related to the activities of those reputedly connected with organized crime.

(d) Appellees themselves, and frequent users of the spa, permitted themselves to acquire a widespread and heavily publicized reputation of affiliation with organized crime and have accordingly provoked frequent news commentary respecting those affiliations as well as investigations by assorted police agencies.

The allegedly defamatory article brought to public attention the background of the owners and operators of this lavishly promoted spa; naturally, the ads paid for by the owners did not choose to present such a full picture of Rancho La Costa to the public.

Essentially this Court in *Gertz* held that one who performs acts which "invite attention and comment"[12] must endure such attention and comment unless it is consciously or recklessly false. The uncontradicted evidence in this case should more than suffice to establish that appellees fit that category: they entered business dealings with reputed organized crime personalities knowing that such dealings invite press attention; they performed many acts publicly relating to the promotion of their business venture; they permitted without challenge years of extensive publication respecting their affiliation with organized crime. Nevertheless, the California Court of Appeal ignored the evidence which competently proved the longstanding unsavory reputation of those con-

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[12] *Id.*, at 345.

nected with Rancho La Costa. The years of news articles respecting these figures was *not* a "shoebox" full of hearsay. It was competent evidence[13] of the reputations which these individuals permitted to develop and which was necessarily known to Rancho La Costa and its principals. They surely invited attention and comment by initiating a heavily advertised legitimate business as a front for such notorious principals.

Given the years of publicity, appellants were entitled to assume appellees to be in the public domain for purposes of free non-malicious discussion. In *Gertz*, it was intimated that media defendants could not be held to a higher standard than *New York Times* malice when the libelous nature of a publication is not facially apparent.[14] The rationale for such a requirement is that a reasonable publisher, editor or reporter would not in such circumstances be on notice of the danger of civil liability implicit in the publication. For the same reason, media defendants should not be held to a higher standard than knowing or reckless disregard of the truth or falsity of a publication when a reasonable publisher would deem the subject of its reporting to be a public figure. Surely any publication embarking upon an article respecting well-publicized personages is entitled to assume that they have invited public attention and comment and to act upon that assumption.

The California Court of Appeal's errant labelling of appellees as private individuals was exacerbated by explicit directions to the trial court to proceed on an impermissible no-fault standard. The sole California statute which would purport to impose a fault standard upon appellees' libel

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[13]C. McCormick, *Law of Evidence* § 249, p. 595 (2d ed. 1974), California Evidence Code § 1324 and Federal Rule of Evidence 803(21).

[14]*Gertz v. Robert Welch, Inc., supra*, 418 U.S. 323, at 331 n.4.

action is subsection 3 of Section 47 of the California Civil Code.[15] Nevertheless, ignoring prior California authority, the Court of Appeal held that the appellants were not entitled to the protection of that section. 106 Cal. App. 3d 646, 664-68. Accordingly, the Court of Appeal remanded the action to the trial court for the purpose of determining at trial whether the appellees were public figures (which in turn would depend upon proving the truth of the publication to the effect that they were involved in organized crime) and, failing that, suffer the imposition of whatever damages appellees prove.

> The plaintiffs are entitled to recover if they can prove (1) the publication of a libelous statement, and (2) damages arising therefrom. Defendants are still entitled to prove if they can the fact that plaintiffs are public figures. They have the burden of proof thereon. . . . If the defendants so prove that plaintiffs are public figures, then plaintiffs in order to recover must, in addition to proving the publication of a libelous statement, prove that the publication was made with malice

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[15]California defined for itself the appropriate standard of liability for defamatory statements, and provided in Section 47(3) that there is a qualified privilege for the publication of defamation:

> § 47. [Privileged publication or broadcast: what constitutes] A privileged publication or broadcast is one made —
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> . . .
>
> 3. In a communication, *without malice*, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information. (emphasis added.)
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> . . .

as that term is defined under California law and damages therefrom.

106 Cal. App. 3d 646, at 668.[16]

Such a retreat to pre-1964 defamation law is plainly contrary to the holding in *Gertz* that the states may not impose liability without fault upon media publications. (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); Restatement Second of Torts § 600 (1977), and Comment thereto.)

Conclusion.

It may fairly be inferred that since *Rosenbloom* the opinions of this Court have been designed to bring into balance the interests in private reputation and in public information. However the opinion of the court below graphically illustrates that state courts, and particularly those in California, have swung the pendulum past the point of balance and dangerously intruded upon interests of free speech and press and consequently the right of the public to be informed. Just as this Court's 1979 decision in *Gannett*[17] was balanced

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[16]The practical impact of this out-of-date rule of strict liability was poignantly described in Laurence H. Eldredge's article *Practical Problems in Preparation and Trial of Libel Cases*, 15 Vand. L. Rev. 1085, 1089-90 (1962) as follows:

> I know of no other type of tort case in which it requires so little time to present the plaintiff's case in chief, in the absence of evidence of special harm. Where the words are clearly defamatory on their face and appear in a newspaper article and there is no claim of special damages, the plaintiff's case in chief may be rested within a few moments after the completion of the opening speech. All that is required is to get the article in evidence, and you have proved your case in chief. I like to do this by subpoenaing the publisher of the paper to bring it with him; then I call him on cross-examination and have him produce and identify the paper, at which time I offer it in evidence. At this point, I generally get him to state (when it is impressive) what the newspaper circulation is and its area. There is no need to put the plaintiff on the stand but it is good strategy, unless there is some reason not to subject the plaintiff to cross-examination, to put him on very briefly and have the jury look at him and hear him tell about how emotionally upset the article made him, if that is a fact.

[17]*Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

and clarified by *Richmond Newspapers,*[18] so is a further review by this Court of the opinion below required to bring into balance the interests of reputation and public information in a fashion which preserves the "breathing space" for fruitful exercise of freedoms of speech and press deemed paramount in *Gertz*.

Respectfully submitted,

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[18] *Richmond Newspapers, Inc. v. Virginia,* .... U.S. .... , 65 L. Ed. 2d 973 (1980).